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CONVEYANCER'S NOTEBOOK.

Once again the exigencies of paper control have made changes necessary in the format of this periodical. By using a thinner paper and by employing some variations in type it is hoped to provide rather more reading matter in the Journal than in the preceding volume. This should enable us more adequately to keep pace with the reported decisions without further diminishing the space devoted to articles.

One of the greatest difficulties, apart from technical ones of paper and print, that we have experienced in the last year has been that of keeping track of such Statutory Rules and Orders made under Emergency Legislation as may directly affect the conveyancer. This is no new difficulty, of course, but Departmental legislation by cross-reference to earlier Rules and Orders has enhanced it. Additional arrangements have been made which, we hope, will be adequate.

One great problem, however, remains, namely, that of selection. A simple illustration may be taken from a case which recently came to our notice. Speaking generally it might be expected that "Trading with the Enemy" was outside the scope of the conveyancer's art. Nevertheless, it is provided that under the Regulations no transfer can be made of "enemy property", that is property belonging to an "enemy alien" as defined by the Act and Rules, without a licence of the Board of Trade. Apart from any question of criminal liability there appears to be no definition of the effect of such a purported transfer without licence, but presumably it is invalid as against the Custodian of Enemy Property: cf. *Weiner* v. *German Jewry Central Fund*, [1941] 2 A. E. R. 29. No provision is made for absence of notice that the transferor is acting on behalf of an alien enemy. The most likely cases to be affected by this Act are those concerned with limited companies. A company will be an enemy alien, though registered in this country, if it is "controlled" by persons resident in enemy countries. The necessity for a careful search in the Companies register is, therefore, apparent.

Perhaps from the conveyancer's point of view the activities of the Ministry of Agriculture require the most careful scrutiny pending the appearance in the field of the Ministry of Planning. The increase in dealings with agricultural land make it important for all conveyancing

solicitors to familiarise themselves with the Rules, for example, governing notice to quit agricultural tenancies (see Reg. 62 of the Defence (General) Regulations, 1939, as amended down to S. R. & O., 1942, No. 2561) and the powers of the War Agricultural Executive Committees (see the Cultivation of Lands Order, 1939 (S. R. & O., 1939, Nos. 1078, 1523), Cultivation of Lands (County Boroughs) Order, 1939 (S. R. & O., 1939, No. 1079); Cultivation of Lands (No. 2) Order, 1940 (S. R. & O., 1940, No. 1197); Cultivation of Lands (Agistment of Livestock) Order, 1940 (S. R. & O., 1940, No. 1602)). The most recent matters are the powers in relation to certificates under the Rent Restrictions Acts (S. R. & O., 1942, Nos. 507, 580; 1943, No. 582) and the power of the Minister to transfer to a committee the agricultural functions of a county council (S. R. & O., 1943, No. 745).

Powers of trustees of settled land or of land held on trust for sale —enlargement of power of Court.—The Settled Land and Trustee Acts (Courts' General Powers) Act, 1943, contains one feature that seems most undesirable. Its primary provision in section 1 is for a limited period, namely, until the expiration of the Emergency Powers (Defence) Act, 1939. To this extent it is, and by its very nature must be, an emergency provision. Its secondary provision, namely, the repeal of certain words in section 64 of the Settled Land Act, 1925, appears to be permanent. It seems to be at least a pity that permanent and ephemeral statutory provisions cannot be kept separate even in wartime.

Section 1 enlarges the powers of the Court under section 64 of the Settled Land Act and section 57 of the Trustee Act to authorise transactions including the expenditure of capital money which would not otherwise be authorised by the Act. Quite clearly, its purpose is to authorise expenditure out of capital that would otherwise fall upon income, if the expenditure was incurred at all.

The expenditure is to be incurred for the " management " of settled land or land held on trust for sale. " Management " includes all the acts referred to in section 102 (2) of the Settled Land Act, acts which under the principal Act are confined in the case of settled land to trustees during a minority, but are conferred on a trustee for sale in any case : *Re Gray*, [1927] 1 Ch. 242. The Court can only authorise such act by the trustees provided that the action would be generally for the benefit of the persons entitled under the settlement or trust for sale : section 1 (2) (a). Presumably, " generally for the benefit of the persons " has a somewhat similar meaning to " benefit of the settled land " in section 64 and " is in the opinion of the Court expedient " in section 57. Under section 57 the Court had no power to make an order unless it was for the benefit of the whole trust : *Re Craven's Estate* (No. 2), [1937] 1 Ch. 431, and orders have been made to raise money : *Re Mair*, [1935] 1 Ch. 562. Similarly, under section 64 an order was made to raise money to pay the debts of a tenant for life incurred in management of the estate : *Re White-Popham*, [1936] Ch. 725. It is thought, however, that this emergency power is primarily designed to encourage proper maintenance of the land at the expense

of capital rather than income. Under section 64 of the Settled Land Act, there was no power to authorise expenditure on improvements that were not improvements for the purposes of the Act. However, for reasons subsequently appearing, these provisions are intended to cover something much wider than improvements.

It must not only be for the benefit of the persons entitled under the settlement generally but must either (i) be shown that the available income *from all sources* of a person in possession or receipt of rents and profits, who might be expected to bear the expenditure, has been so reduced by circumstances arising out of war conditions (which includes increase in rates of taxation) as to render him unable to bear the expenditure without undue hardship, or (ii) if there is no such person the income arising has become insufficient for the purpose: section 1 (2) (b) (c).

The Court must (section 1 (3)) take into consideration all the circumstances of the case, but in particular three factors. (i) The extent of the obligations of the person in possession, whether legally enforceable or not and whether or not relating to the land. (ii) The extent to which other persons entitled under the settlement are likely to benefit from the action taken *or* from the relief which would accrue to the person in possession. (iii) The extent to which the order would be likely to involve a loss to any other person entitled under the settlement without his receiving any corresponding benefit.

It is in this last sub-section, perhaps, that the widest extension of the principal Act is to be seen. Primarily the expenses of current management fall upon the tenant for life, but as a general rule his liability is limited to meeting the expenses if he incurs them. If he chooses not to incur the expenses the fact that the property deteriorates is not a liability falling upon him. On this point we print a short article on another page (*post*, p. 4). This Act clearly is to avoid the discouragement against economical management which having to meet expenses out of a depleted income tends to incur. But it must not be thought that any tenant for life can now cast his expenses of management upon capital. Analysis of the conditions shows them in many respects to be stringent. Nevertheless, it departs from the traditional policy of the Acts on two counts. First, it clearly contemplates the use of capital as a wasting asset if thereby the corpus is generally benefited. Secondly, it provides for consideration being given to factors outside the settlement.

Section 2 of the Act provides that the words "but not include an application of capital money in payment for any improvement not authorised by this Act or by the settlement" in section 64 (2) of the Settled Land Act are thereby repealed (with consequential amendments in section 64 (1)). This repeal is significant in two ways. First, it is clear that in time to come some guidance by way of precedent must be forthcoming on the circumstances in which the power will be exercised. "Improvements" will include those authorised by the Act for which leave of the Court will not be necessary and those not authorised by the Act for which such leave will be requisite.

Secondly, it brings out clearly the extensive character of the emergency provisions. Although we have tended to emphasise their importance in connection with capital money the Act is not so limited.

The nature and kind of powers which the Court may be asked to authorise can be determined only in the light of the requirements of management.

One other point is of importance. An order may be obtained in respect of something done before the application for the order, even before the passing of the Act, and the Court may direct such adjustments of accounts and such repayments as may to the Court appear requisite for giving full effect to the order.

REPAIRS OF SETTLED PROPERTY (*a*).

By H. M. BROUGHTON,
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It is impossible in a short article to exhaust this subject, but it is hoped that it may prove useful to some who have to advise on the liability for repairs.

First, we must bear in mind that a tenant for life is not liable to a remainderman for permissive waste, that is, allowing the settled property to go to rack and ruin, unless a special obligation to repair is imposed on him. When we remember the old rule in *Howe* v. *Lord Dartmouth*, under which settled leaseholds and wasting and speculative investments had to be sold or treated as sold in order that the remainderman should be sure of his reversionary interest, we may wonder that Equity did not enforce on a tenant for life the duty of repairing the property, so that the remainderman might enjoy the property in his turn. In *Re Cartwright*, 41 Ch. D. 532, land was settled on M for life and after her death on N, his heirs and assigns, and there was no provision touching the liability of M for repairs. As was said by Fry, L.J., in *Re Ridge*, 31 Ch. D. 504, at p. 507: "Whenever a settlor has not stated that a tenant for life is not to be impeachable for waste, he is impeachable."

So that M was impeachable for waste. At the time of her death the property was in a dilapidated condition owing to the necessary repairs not having been done, and it was estimated that a sum of £166 odd would be required to put the property in repair. N claimed this sum from M's executor, who took out an originating summons for directions as to whether any and what sum should be paid to N as compensation. Kay, J. (as he then was), in his judgment, said: "To ask me . . . to hold that a tenant for life is liable for permissive waste to a remainderman is to my mind a proposition altogether startling", and he disallowed the claim. It will be observed, as we have already noted, that the fact that M was impeachable for waste made no difference. But in *Re Lacon's Settlement*, [1911] 2 Ch. 17, great stress was laid on the fact that the tenant for life was without impeachment of waste. The property in that case was settled (in effect) on A for life, with remainder on B for life, and the tenants for life were without impeachment of waste. A granted a lease and the

(*a*) This article is, of course, subject to any emergency legislation affecting the same. See, in particular, p. 2, *ante*.

lessee covenanted to keep the buildings in repair. A died and on the expiration of the lease a claim was made against the representative of the lessee for damages for breach of that covenant. The Court of Appeal held that B was entitled to keep the damages for his own use. Swinfen Eady, J., had held that they must be paid to the S. L. Act trustees as capital moneys. Buckley, L.J. (as he then was), said: "Under the settlement the tenant for life was not impeachable for waste. Inasmuch as the lessor was not impeachable for waste he could have granted a lease limited to his own lifetime which did not contain repairing covenants. . . . The order under appeal is not one which affirms that the moneys must be applied in effecting the repairs, but one which affirms that there must be added to the capital moneys this sum of £881, with the result that that sum cannot be applied in repair, but must be held upon trust for the tenant for life during his lifetime and subsequently for the remaindermen. Such a result is, I think, quite impossible." Kennedy, L.J., after referring to section 53 of the Settled Land Act, 1882, which provided that a tenant for life in reference to the exercise of the powers of the Act was to be deemed a trustee for all parties entitled under the settlement, said: "When, in fact, the lease has expired I do not see how the section operates to deprive the legal life tenant without impeachment of waste of moneys which, being paid by the lessee in satisfaction of his legal duty under the covenant to prevent waste, do not, when they come into the hands of the tenant for life, represent, if I may be allowed the phrase, a corresponding liability on his part, because, by the express terms of the settlement, he has been relieved from any such liability." Obviously, the Lords Justices were influenced by the fact that the tenant for life was unimpeachable for waste. There is an *obiter dictum* of Kennedy, L.J., in that case which we may respectfully question. He said: "The case put by Swinfen Eady, J., of the destruction of a house of which a lease has been granted is not, as it seems to me to be, a parallel case to the present. There is, I think, a real difference between the insurance money which represents the subject-matter of the lease and compensation for waste in respect of which the lessor is not answerable to any successor in interest." This is difficult to follow, as the damage done by a particular fire may be less than the damage caused by the property being allowed to perish owing to want of repair.

The Legislature does not seem to have been shocked, as the Court of Appeal were in the last-mentioned case, by the idea of the damages being capital moneys, and yet applicable for executing repairs, as by the Settled Land Act, 1925, s. 80, damages for breach of covenant by a lessee are *prima facie* capital money. Further, they can be applied within twelve months after receipt or such extended period as the Court may allow in or towards making good the breach of covenant. This rule applies whether the lease was made before or after the commencement of that Act.

Re Cartwright related to freeholds, but previously there had been a decision in *Re Courtier*, 34 Ch. D. 136, by the Court of Appeal that an equitable tenant for life of leaseholds was not liable for dilapidations caused in the testator's lifetime. "I think", said Cotton, L.J., "that there is no such obligation on her. She is not

bound to the landlord under the covenants; the trustees are bound, and it is their duty to repair the houses in accordance with the covenants in the leases out of the corpus of the estate."

In that case the tenant for life kept up the buildings in the same state of repair as they were in at the testator's death, and it must be admitted that they were in a very bad state of repair. There is a distinction between a debt and a liability, so that as between the testator's estate and a life tenant under his will the latter must perform the covenants to repair, etc., during the remainder of his life (*Re Betty*, [1899] 1 Ch. 821). If leasehold premises are left to a person absolutely, it is clear that he must bear the costs of repairs which have become necessary after the testator's death (see *White & Tudor's Leading Cases in Equity*, 9th ed., Vol. I, p. 698) " and it cannot matter whether the leasehold is given to A for life with remainder to B, or to A absolutely; because A and B in the one case, and A in the other, take the whole leasehold interest, and they are the persons who, in my opinion, should bear the burden ", *per* North, J., in *Re Betty*, *supra*, at p. 830. According to *Jarman on Wills*, 7th ed., p. 1985 : " Dilapidations under a repairing lease, although existing at the time of the testator's death, constitute a liability and not a debt within the meaning of the rule. . . . If the property is out of repair at the testator's death, it seems that the cost of putting it in repair ought to be borne by A [the tenant for life] and B [the remainderman] in proportion to their interests." In *Strachan's Law of Trust Accounts*, 2nd ed., pp. 38—41, there are laid down some useful provisions relating to repairs by trustees to which we would refer our readers.

Among the improvements authorised by the Settled Land Act, 1925, are some which bear a close resemblance to repairs, and it must not be forgotten that a tenant for life has, during such period as the Ministry of Agriculture and Fisheries by certificate in any case prescribes, to repair at his own expense any of these statutory improvements (Settled Land Act, 1925, s. 88 (1)).

CONDITIONS IN RESTRAINT OF RELIGION.

By BERTRAM B. BENAS, B.A., LL.B., Barrister-at-Law.

When *Clayton* v. *Ramsden*, [1943] A. C. 320, was in the Court of Appeal period of judicial consideration, then *sub nom. Re Samuel, Jacobs* v. *Ramsden*, Lord Greene, M.R., coined the phrase " Conditions in Restraint of Religion " (S. C. [1942] Ch. 1, at p. 30), a term of convenience which constitutes a useful addition to the legal vocabulary. The framing of clauses and provisions and other forms of legal expression generally precede their terminological description, and the latter become standardised in course of time. Such terms are often not fully descriptive in themselves but in practice they become sufficiently related to that which they seek to describe so as to form a definitive label. To speak of " Restrictive Covenants " *simpliciter* is to call to mind covenants restrictive of the user of property in land, although covenants which restrict may extend to a far wider range.

To speak of "Covenants" or "Contracts in Restraint of Trade" calls to mind restrictive provisions relating to vocations extending beyond the sphere of *trade*, in the literal sense of the word. These labels, however, have become terms of art; they save the circumlocution of unwieldy sentences, and this new addition to the legal vocabulary has the obvious credentials for current adoption.

Conditions in Restraint of Religion of the kind envisaged by the Master of the Rolls in *Re Samuel* (*supra*) may be regarded as of the genus "Conditions in Restraint of Marriage", but they may well be categorised as a genus of their own, for restrictions of the kind contemplated in the case cited are from time to time imposed by testators upon their beneficiaries without any relation to marriage at all, and since conditions in partial restraint of marriage have for long been upheld as valid (with certain exceptions to be referred to later), *Clayton* v. *Ramsden* (*supra*) turned on the question of the ascertainment of the descriptions of entity and faith used by the testator and not on the validity of the partial restraint of marriage imposed by the will.

Both in the Court of Appeal and in the House of Lords in the case cited, *dicta* are to be found which suggested that there were those who held that testamentary provisions of a restrictive nature are generally undesirable. The Master of the Rolls observed (at p. 13) that "the testator in this case did what many testators do, or attempt to do, namely, direct the lives of his children from the grave. Such a thing is distasteful to many people, and I can well understand the desire of a Court to escape from such a result if the language used and the law applicable so permit". Lord Atkin observed ([1943] A. C., at p. 325): "For my own part, I view with disfavour the power of testators to control from their grave the choice in marriage of their beneficiaries, and should not be dismayed if the power were to disappear". Lord Romer observed (at p. 332), referring to the testator in the case cited, that "he was one of those testators, of whom I venture to think there have been far too many, who by means of a forfeiture clause have sought to compel a person to whom benefits are given by the will to act or refrain from acting in matters concerned with religion not in accordance with the dictates of his own conscience, but in accordance with the religious convictions of the testator himself". His Lordship, however, hastened to add: "That a testator may do this should he so desire is beyond question." It will be noted that their Lordships varied in their estimate of the sphere of restrictions which might be regarded as undesirable. Lord Greene, who treated the matter of undesirability objectively, dealt with testamentary directions of the lives of the beneficiaries of a general nature, Lord Atkin disapproved testamentary control in respect of marriage, and Lord Romer particularised as to directions "in matters concerned with religion". It may very respectfully be submitted that a "name and arms clause" is a form of direction to a beneficiary involving, at any rate as regards name, a most substantial change affecting the personality of the recipient. *Inter vivos*, in the case of a settlement made under the Infants Settlement Act, 1855, the insertion of such a clause has been approved by the Court (see *Re Williams*, 6 Jur. (N.S.) 1064). Vaizey (*On*

Settlements, Vol. II, p. 1268) refers to the rules for framing shifting clauses by Charles Butler as "famous". (See Butler's Note, Co. Litt. 327a, Note 2, II 2. The learning on "Name and Arms" clauses is to be found therein, and see also II *Bythewood & Jarman's Precedents*, 3rd ed., p. 173; 3 *Dav. Prec.*, 3rd ed., p. 352. The latter regards the clause in Butler's "well-known and excellent note" as "probably the parent of most of those in common use".) Vaizey observes with regard to shifting clauses (*ibid.*) that "the condition of most frequent imposition is that of the assumption and use of the settlor's name and arms; and clauses used for this purpose afford a model, by reference to which conditions requiring the profession of a specified form of religion, residence at a specified place, or obedience to any other direction by the settlor may be framed". *Banning on Marriage Settlements* in the chapter on "Shifting Clauses" (p. 141) observes that "it is not unusual for a settlor to desire to make an estate limited by the settlement defeasible in certain events. There is no limit to the number of contingencies upon which this may be desired. One of the most usual cases is where the settlor desires a person taking under the settlement to assume a particular name and arms, and endeavours to enforce this desire by rendering the estate liable to go over to some other person in default of compliance . . . there are numerous other special events upon the happening whereof it may be desired that interests should be forfeited, such as changes of religion, succession to a peerage, marriage with a particular person, or without a particular consent and the like". The resettlement of settled estates, according to the prevalent practice of conveyancers, involves, generally speaking, parental influence, and the Court has always favoured such resettlements in general, in the absence of unfairness, the latter element having to be considered because of the son curtailing his reversionary interest. In a normal gift under a will the beneficiary is surrendering nothing and is simply a direct object of bounty. It does not appear to be unreasonable that that bounty may be made conditional upon the fulfilment of certain wishes of the donor. The criticism directed against such gifts is based upon the limitations imposed upon the recipient. It is a little difficult to see why the desires of the recipient should be unlimited and at the same time the desires of the provider of the bounty restricted. Freedom of disposition by will in general has become a right, which, notwithstanding its partial abridgment by the Inheritance (Family Provision) Act, 1938, would not appear to be one with which the public of this country would lightly dispense.

The element of election in the cases of a conditional gift of this kind—election not in the older technical sense of Equity, but election in fact—came into consideration in *Re May, Eggar* v. *May*, [1917] 2 Ch. 126. The case involved the question as to whether an infant was capable of satisfying a condition as to choice of religion. Neville, J., therein observed (at p. 129) that during the time until the beneficiary reaches the age of twenty-one he could not, in the eyes of the Court, determine what his religion should be. Having come to the conclusion that the testatrix meant that there was to be a choice on the part of the beneficiary, his Lordship thought that he must have an opportunity of exercising that choice, and that opportunity would

be his after attaining twenty-one. Supposing, the learned Judge asked, that in the mind of the testatrix it was to be a question of volition on the part of the beneficiary, was it possible to say that volition could be exercised so long as in the eyes of the law he had not reached years of discretion and was therefore unable to decide for himself or to make an *election* of any kind? In argument it was contended that an infant cannot *elect*. The will re-emerged in [1932] 1 Ch. 99 under the same name, and therein (at p. 103) Luxmoore, J., regarded Neville, J., as having said in effect: "The Court will give this child [*i.e.*, the beneficiary in his infancy] a *locus pœnitentiæ*." *Re May* appears to be the clearest authority for manifesting that element of choice which confronting a beneficiary as to taking a gift under conditions, or retaining his unconditioned existence and disclaiming the gift, affords the rational basis for validating such gifts, provided the condition is not otherwise open to objection. Restrictions of the kind are, after all, not absolute but relative in the sense that the intended recipient is not in any way under legal compulsion to accept or adopt a particular course of thought or action. He can accept the gift with the conditions (assuming the conditions are such as the law will regard as valid) or he can disclaim the gift and retain complete freedom in respect of the restraint. In other words, he can *elect*, but he cannot have it both ways.

The motive which can impel a testator to make a provision restrictive in respect of religion in relation to marriage is revealed in a clause of a will which came before the Court in an unreported case. The testator declared: "I make this provision because I am of opinion that it will conduce to my daughter's happiness if she marries in the faith with such consent as aforesaid." The provision was as follows: "If my daughter . . . shall marry (with my consent or after my death with the consent either of" one or other of her aunts "or of one of my sons if living or any managing trustees) a born Jew who still professes the Jewish religion (but not otherwise)" certain sums were bequeathed to her absolutely and by way of settlement. A further clause provided for forfeiture "If any child of mine shall either (a) marry a person other than a born Jew who still professes the Jewish religion (b) adopt any religion other than the Jewish religion or (c) dispute the validity of this my will. . . ." The declaratory clause above quoted was followed by an expression that the testator made that declaration "with the knowledge that if she does marry without consent she is already in receipt of a sufficient income from her mother's estate". It is clear therefore that the testator envisaged the restraint from the point of view of what he regarded as a parental direction for his daughter's welfare, a direction the compliance with which would not be determined by an alternative of penury.

The very fact that a testator discriminates in favour of a particular denomination goes to show that such a provision involves a preference *for* such communion rather than a discrimination *against* any other. Furthermore, although in some wills there may be found a provision restrictive of marriage with one of a generic group, it will be seen often that such discrimination is presumably dictated by the fact that the testator belongs to a minority denomination and the generic group represents the great majority. That of course there are specific

restrictions in the opposite proportions and of a negative character cannot be gainsaid, as, for instance, provisions restrictive of marriage as between one or other of the Christian communities.

That, however, restraints of the kind are not necessarily attributable to a negative attitude of intolerance but can be envisaged as directly or indirectly a positive urge in favour of limitation to the testator's own fold is probably one of the main factors which determined the Courts to hold that such provisions were valid as not being contrary to public policy. Furthermore, an illustration in that behalf is to be found in clauses such as to the following effect: If any child of the testator shall become a Roman Catholic Priest or a Professed Member of any Religious Community involving vows of chastity or poverty, he or she shall forfeit the life interest thereinbefore given to such child in the said will. Such a clause was contained in a will of a testator who, at the same time, made large gifts in his will towards Catholic charities and a residuary gift in certain circumstances for the advancement of the Catholic religion of which he was an adherent. The forfeiture was manifestly referable to the vocational status of the child and obviously had no relation to any discriminatory attitude against the Church in question. (See, *e.g.*, *Re Dickson's Trust*, 1 Sim. (N.S.) 37; *Wainwright* v. *Miller*, [1897] 2 Ch. 255.)

So many cases of conditions in restraint of religion occur in respect of gifts conditional upon marriage within certain spheres, or not within certain spheres, that the conveyancer in dealing with the problems of such gifts has carefully to distinguish between those cases or parts of cases which concern the validity of restraint of marriage from those which affect questions solely relating to restraint of religion. In general, the former are grounded upon rules of *law*, and the latter mainly, although at points not entirely (such as the question of "public policy"), upon rules of *construction*. As to gifts in restraint of marriage, the law is shortly and conveniently stated in the late Walter Strachan's *Practical Conveyancing* (pp. 184—185) with the addition of some experienced advice from that learned conveyancer in respect thereof:—

"It is almost impossible to state any intelligible principles which will reconcile the numerous cases on the subject, and the only way is to take note of a few leading cases and regard the whole law on this subject as arbitrary—'a wilderness of single instances'.

"The general rule is usually expressed by saying that a condition not in general restraint of marriage . . . is valid.

"A limitation of property to a person until marriage and then over (*determinable limitation*) is good (*Lloyd* v. *Lloyd*, 2 Sim. (N.S.) 255); but a *condition subsequent* as regards personalty is bad (*Bellairs* v. *Bellairs*, L. R. 18 Eq. 510). . . .

"I think the best advice I can give you in framing clauses on this subject is to adopt the machinery of a '*determinable limitation*', and on no account to frame a '*condition subsequent*': (*a*) . . .

"The cases on this subject being so destitute of any consistent principle, the safe way is to have recourse to the best authorities before

(*a*) In Sanger on Wills and Intestacies, 2nd ed., p. 56, it is observed that "the distinction between a condition and a conditional limitation is sometimes refined (see Chitty, J.'s, judgment in *Re Machu*, 21 Ch. D. 838)".

settling your draft will in any exceptional case. The following may be consulted: Notes to *Scott* v. *Tyler* (1 Wh. & Tud. L. Cas.); Ruling Cases, Vol. VI, p. 347; Theobald on Wills . . . , Pollock on Contracts . . . 'Restraint of Marriage' ", *Encyclopædia of the Laws of England.*

Having regard to the difficulties attendant upon "Conditions Subsequent", whatever the nature of the conditions may be, the views of the late learned conveyancer should be carefully borne in mind. (See *Re Moore, Trafford* v. *Maconochie*, 39 Ch. D. 116; *Re Lovell, Spark* v. *Southall*, [1920] 1 Ch. 122.)

If employing the method of condition rather than limitation, the conveyancer in drafting provisions in restraint of religion within the meaning of the phrase as used by the Master of the Rolls must first satisfy himself as to whether the condition is void as against public policy. There is substantial authority for asserting that a condition in restraint of religion is *per se* valid. (See *Hodgson* v. *Halford*, 11 Ch. D. 959.)

Satisfied as to that, a difficulty may be raised as to religious identification. *Clayton* v. *Ramsden* (*supra*) raised this point but the decision did not turn upon it. The case concerned a clause in a will forfeiting a legacy if the beneficiary married a person "not of Jewish parentage and of the Jewish faith". Their Lordships held that "Jewish parentage" meant of the "Jewish race" and that this was too vague to enable such a condition to be upheld. Accordingly it was unnecessary for the purposes of the will in question to decide as to whether the term "Jewish faith" was sufficiently certain to enable a condition dependent upon those words to be upheld. Lord Wright dissented from the majority in respect of the identification of the "Jewish faith" and observed that he did not see why "Jewish faith" should not connote a specific fact equally with "Christian faith" and why it was not sufficiently clear and distinct to identify a specific set of facts to which it may be applied. Whatever was said about the identification of the Jewish faith or Jewish religion was clearly *obiter.* (Reference may be made hereon to the note on this case by the present writer in 59 L. Q. R. 215.) The use of the term "Jewish parentage" brought into question the idea of "Jewish race" and obscurities resultant from that use enabled the decision to be based upon the term "Jewish parentage" without regard to the term "Jewish faith", and the fact that in analysing the term "Jewish parentage" the word "Jewish" was the determining element is best shown by considering what decision would have been arrived at if "Christian parentage" or "Islamic parentage" had been used, these adjectives not importing the question of race. In so far as the masterly judgment of Lord Greene, M.R., with its full review of the authorities, in the same case in the Court of Appeal (*sub nom. Re Samuel, Jacobs* v. *Ramsden*, [1942] 1 Ch., at p. 13) dealt with the identification of the "Jewish faith", it has not been conclusively reversed in the House of Lords, and his judgment and the speech of Lord Wright in the Lords claim the closest examination, which will reveal what the present writer respectfully regards as the unanswerable observations Lord Greene and Lord Wright made thereon. It is certain that *Clayton* v. *Ramsden* should not deter the conveyancer from framing a suitable condition on behalf of any religious denomination. A word may be

said as to the present authority of *Re Blaiberg*, [1940] Ch. 385. It is the fact that Lord Russell of Killowen observed that it may well stand as a decision declaring the material words in that case as constituting a gift void for uncertainty ([1943] A. C., at p. 329), but as his speech at that point dealt with a part of the decision which is *obiter*, it would seem that the judgment of the Court of Appeal that that case is overruled stands *pro tanto*. But a Condition in Restraint of Religion may be defeated by reason of it being held to be an infringement of the Rule against Perpetuities. In *Re Spitzel, Spitzel* v. *Spitzel*, [1939] 2 A. E. R. 266, a testator provided for forfeiture in the event of any child or grandchild who should forsake the Jewish faith or marry outside that faith, the forfeiture to take effect " as from the time when the fact of such event having occurred shall be proved to the satisfaction of my trustees ". Bennett, J., held that as the moment of time specified in the will for the taking effect of such forfeiture might not arise until after the expiration of twenty-one years after the death of the survivor of the beneficiaries living at the death of the testator, the clause was void as infringing the Rule against Perpetuities.

In framing provisions of this kind in relation to marriage the doctrine of *in terrorem* must be remembered. Shortly stated, where a condition in partial restraint of marriage is imposed in relation to a legacy (whether of personalty generally or of a mixed fund representing personal property and the proceeds of realty) the condition is void if it seems that the gift is *in terrorem*, but the presence of a gift over will be regarded, as a rule, as ousting the doctrine.

If negative answers can be given to the questions, is the description of the faith such that it is unable by proper evidence (the form of which can be provided for by the testator) to be precisely ascertained, is the condition against public policy, is the condition void as an infringement of the Rule against Perpetuities, is the condition *in terrorem*, it would seem that the foundations have been laid for an effective disposition. Still more shortly the tests may be grouped thus : Is the gift void (a) as being against public policy or (b) for uncertainty or (c) as a perpetuity?

It remains to be seen how the conveyancing precedents have been framed to meet the contemporary state of the law. *Hayes & Jarman's Forms of Wills* (16th ed. by C. E. Shebbeare) at pp. 397, 398, provides a full and elaborate clause imposing condition of religion and lays the conclusive responsibility as to the decision whether the beneficiary professes the particular faith in question upon the trustees. To the present writer the validity of that admirable clause does not seem in the slightest degree to have been impaired by *Clayton* v. *Ramsden* (*supra*) or any other decision. Reference may be made to p. 339 thereof where some points chiefly to be attended to in framing clauses of this nature are considered with reference to the decided cases. It should, however, be noted that the edition was published in 1933. Precise definition and methods of ascertainment conclusive on the face of the will appear to be the prerequisites to dispose of uncertainty, and uncertainty was held by the House of Lords to be the vitiating element in the will dealt with in *Clayton* v. *Ramsden* (*supra*). The current edition of *Key & Elphinstone's Precedents* (published in 1940;

14th ed., Vol. II, by F. E. Farrer, M. R. C. Overton and C. A. G. Simkins) includes (p. 858) a clause which provides against the marriage of a beneficiary with a person who does not at the time of his marriage in the uncontrolled opinion of the trustees or trustee outwardly profess the faith in question. This was framed in the light of *Re Blaiberg* (*supra*) and would appear to be still unaffected by any subsequent decision. The only comment that suggests itself is that, effective as the clause no doubt has proved to be, the placing of uncontrolled decision upon trustees does not always tend to ready acceptance of the responsibilities attached to the office. A most useful set of addresses is found in *Key & Elphinstone* (same edition, Vol. II, p. 295) relating to the various authoritative organisations of the respective religious communities, and it may be that some provision which would secure a certificate from such accredited sources would ease the burden of trustees called upon to approve in respect of a Condition in Restraint of Religion. In Vol. II of the *Conveyancer's Year Book* (for 1941) pp. 186—187, Sir Lancelot Elphinstone offers a most ingenious provision by way of statutory declaration. In Vol. III (for 1942) a difficulty suggested in 57 L. Q. R. 428 is met by an addition to the form of the words, and the provision seems in every way most effective and to throw a minimum of responsibility upon trustees. (See further hereon *Prideaux's Precedents*, 23rd ed. by R. M. C. Munro and Sir Lancelot Elphinstone, published in 1936–37, Vol. III, at p. 233.) The 1941 edition of the Cumulative Supplement of the Encyclopædia of Forms and Precedents contains a form of gift over on marrying a person who is not of a certain religion, framed on the footing that *Re Blaiberg* (*supra*) has been overruled by the Court of Appeal, and as above stated, in the view of the present writer, *pro tanto* the House of Lords decision has in no way altered the position so that, to the extent that it reaches, the clause as drafted appears to be unaffected. A note adds that the clause must be so drafted so as not to interfere with the right of a parent or guardian in the exercise of his parental duty as regards the religious instruction of a child, citing *Re Borwick, Borwick* v. *Borwick*, [1933] Ch. 657, in that behalf. That case illustrates the fact, as indicated above, that a Condition in Restraint of Religion can be void by Rule of Law (and not simply by Rule of Construction) if it is radically vitiated by a defect such as, in the case cited, being contrary to public policy.

There can be no doubt that conveyancers will be able to overcome the several difficulties raised in the cases already decided in respect of Conditions in Restraint of Religion. (See hereon *The Conveyancer* (N.S.), Vol. 7, at p. 157—note by R. E. Megarry and the earlier notes in Vol. 5, at pp. 312—315 by S. J. Bailey and by the same writer in Vol. 6, at pp. 137—139.) Certification as to the matter in question by an external authority and made conclusively acceptable by the trustees seems to the present writer the best method of ascertainment by satisfactory evidence and the most definitive method to adopt. That these conditions will continue to be required by testators and settlors seems certain. The latest edition of *Pollock on Contracts* (11th ed., edited by P. H. Winfield) envisages the framing of contracts of a similar kind, and upholds their validity (citing *Re Whiting*,

[1905] 1 Ch. 96, and observing that there is no distinction between a will and a settlement for this purpose). *Clayton* v. *Ramsden* (*supra*) appears after all to be but a link in the chain of the legal history of freedom of disposition under English law.

ANCIENT LIGHTS AND ENEMY ACTION.

By E. O. WALFORD, LL.D.

Where buildings have been destroyed by enemy action the owner of " ancient lights " will not necessarily lose his right to light; but, as will be seen the present building restrictions may deprive landowners of the right to *build*, or raise the height of existing buildings.

If a man pulls down an existing building and leaves the site bare for a very considerable period, the inference may be drawn that he has abandoned his right in respect of ancient lights in the old building. It is always a question of fact whether there has been such an abandonment. An express release of the easement would destroy it at any moment, and the cesser of use coupled with any act clearly indicative of an intention to abandon the right would have the same effect (*i.e.*, would cause a loss of the right) without any reference to time (*per curiam* in *R.* v. *Chorley*, 12 Q. B. 515).

Lapse of time inconclusive.

Mere lapse of time is not of itself conclusive evidence of the abandonment of an easement which the owner has chosen not to use. In one case A had a right of way to mines by virtue of a reservation in a deed of 1704. His successors did not exercise the right until 1810, but it was held that the right was not extinguished, though it might have been extinguished if meanwhile there had been adverse occupation of the means of access : *Seaman* v. *Vawdrey*, 16 Ves. 390. But in the case of a right of light acquired by prescription under the Prescription Act, 1832, it will be recalled that the period of twenty years must be an uninterrupted one and must be next before the bringing of an action in which the claim to the right is brought in question : Prescription Act, 1832, s. 4. " Interruption " in this connection means interruption for one year or more " after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made ". Moreover the interruption must have been " submitted to or acquiesced in " : *ibid.* This point is considered more fully in a later part of this article.

It will be noted, therefore, that there are two stages for consideration :—

(1) The access of light may have been interrupted during the period of twenty years following the commencement of enjoyment of such access.

(2) The access of light may have been enjoyed continuously for a period of twenty years, but such enjoyment may have been interrupted subsequently.

The first point to be noted is that although section 3 of the Act

states that the right to light shall be absolute and indefeasible after it has been enjoyed for a continuous period of twenty years, it is provided by section 4 that such period " shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question ". In other words the rather peculiar effect is that if the right to light is claimed by prescription under the Prescription Act, 1832, it really does not matter whether the window or light in question has existed for more than twenty years or more than 60 or 100 years : enjoyment of the light must have been free from interruption (as above defined) for any single complete period of one year during the twenty years next before some suit or action bringing in question the claim to the right to light. Once such an action or suit is brought and the right is upheld, then the right is absolute and indefeasible, so that future interruptions will not matter, unless the circumstances are such as to show that the dominant owner has abandoned, *i.e.*, impliedly released, his right.

The second point follows naturally from the first, namely, that until such action is brought the right to the light is always in jeopardy of defeat if it has not been enjoyed continuously. It is proposed to ignore certain periods which are to be excluded when calculating the twenty years period, *e.g.*, the infancy or lunacy of any person otherwise capable of resisting a claim to the right to light (see section 7 of the Act). Suppose that a window has existed in A's building for eighty years. If at any time during the past twenty years the access of light has been interrupted for a continuous period of one year, then if the dominant owner has submitted to or acquiesced for the whole of such year in the interruption, after having notice of it and of the person responsible for the interruption, he will be unable to establish his legal right to the light flowing to the window in question.

Prompt action necessary.

What is the practical effect of all this? Clearly, it is that if a person has acquired by prescription a legal right to the access of light to a window he must act promptly if anyone interferes with that access. It does not matter whether the right has been enjoyed for 20, 30 or even a hundred years. Continuous enjoyment (without any effective interruption lasting a year) down to the date when the right is called in question in any legal proceeding must be proved, unless the claimant can show that he did not " submit to or acquiesce in " the interruption. The claimant must therefore take some step within a year (or, as we shall see, within a very short period if he desires to obtain an injunction). Another peculiar point arises in connection with the section which disregards interruptions for less than one year in duration. The effect of that rule, for practical purposes, is that when the light has been enjoyed for nineteen years and one day, the person enjoying it cannot be deprived of the right to claim enjoyment for twenty years; for any interruption during the twentieth year will be ignored. On the other hand, twenty years in a statute cannot be read as nineteen years and one day. Accordingly, if the claimant commences his action during the twentieth year it will be premature : *Bridewell Hospital* v. *Ward* (1893), 62 L. J. Ch. 270.

He can, and no doubt should, protest, and state that he is not prepared to submit to or acquiesce in the proposed or actual interference with his light. And when the twenty years have expired he will be entitled to take proceedings in respect of the infringement of his right during the twentieth year: *Flight* v. *Thomas* (1840), 11 A. & E. 688.

Injunctions.

It does not follow that the claimant will obtain an injunction if he stands by and allows an adjoining landowner to erect a building which will infringe the claimant's right, even though the claimant is unable to take proceedings owing to the fact that the interruption is threatened during the twentieth year of enjoyment of the light. He should undoubtedly warn the adjoining landowner of his claim, and inform him that if the proposed building is erected he will if so advised on the expiry of the twentieth year take proceedings against him for damages and, if so advised, for an injunction restraining him from erecting it, or, if completed meanwhile, requiring him to pull it down: see *Lord Battersea* v. *Commissioners of Sewers*, [1895] 2 Ch. 708, on this question. The exact circumstances in which such a mandatory injunction may be sought cannot conveniently be dealt with here. It may, however, be said that the broad principles are—

(a) That a *prescriptive* right to light in respect of a window is not an absolute right to the flow of all the light which comes to the window, but only of reasonably sufficient light for ordinary purposes. Even evidence of user of the room or rooms for purposes requiring exceptionally good natural light will not alter the burden of the servient owner, notwithstanding that such exceptional lighting and user have been enjoyed for upwards of twenty years: *Ambler* v. *Gordon*, [1905] 1 K. B. 417. It makes no difference whether the district is residential or industrial: *Horton* v. *Beattie*, [1927] 1 Ch. 75.

(b) No definite rule can be laid down as to the circumstances in which an injunction restraining the interference with ancient lights will be granted. In *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, it was laid down concerning the grant of injunction, as a general rule, that where there are no special circumstances damages *may* be given instead of an injunction if the following conditions exist:—

(i) The injury is small, and damages can be estimated, and

(ii) the injury can be adequately compensated by a small payment—presumably the term "small" is elastic. In the case of a very large building containing, say, two ancient lights, several hundred pounds might be a small payment, and

(iii) the grant of an injunction would be oppressive to the defendant. The test is whether the disadvantage and trouble which would be caused to the defendant by an injunction would be out of proportion to the injury caused by the defendant to the plaintiff: *National Provincial Bank* v. *Prudential Assurance Co.*, 6 Ch. D., at p. 761.

But the mere fact that those conditions do not exist does not necessarily mean that the Court will grant an injunction. The Court ought to incline to damages rather than an injunction: *Fishenden* v. *Higgs & Hill, Ltd.* (1935), 153 L. T. 128; and the rules laid down in the *Shelfer Case, supra*, are merely for the guidance of the Courts.

Bombed sites.

Mere non-user for more than a year of the light previously enjoyed in connection with a window or opening is not an "interruption" within the meaning of the Act: it is merely an intermission: *Carr* v. *Foster*, 3 Q. B. 581; and see *Smith* v. *Baxter*, [1900] 2 Ch. 138. It may suit a man to keep blacked out or even blocked up, a window; or it may not be possible for him to occupy or use the room or building containing the window in question. Again, he may choose or may be compelled by law to demolish the building containing the light, or that building may be destroyed by enemy action. It is clear from *Courtauld* v. *Legh*, L. R. 4 Ex. 126, that there is no interruption in the "actual enjoyment" of the right whilst the building containing the light is unoccupied, in the absence of other evidence of abandonment of the right.

It is, however, also settled law that there can be no prescriptive claim to a right to light for bare land, but only in respect of windows, lights or openings in buildings or erections. Accordingly, if in January, 1940, A had enjoyed the access of light to a window in a building for eighteen years, and then that building was destroyed by enemy action and not rebuilt for more than a year, it might be thought that A would then lose the benefit of the eighteen years' enjoyment, and in 1942 he would not merely be in no better position by reason of the enjoyment of the right for twenty years, but (having lost the benefit of the enjoyment for eighteen years of the light) would have to commence to prescribe afresh in respect of any window placed in a building erected thereafter on the bombed site. But that is not the case: "actual enjoyment" is deemed to continue unless there is actual physical interruption by a third party: *Carr* v. *Foster*, 3 Q. B. 581; *Smith* v. *Baxter*, [1900] 2 Ch. 138; for the Act requires that the claimant should have notice of the interruption and of the person *making or authorising* it (which presupposes some physical act of interference): *ibid.*

Acquiescence and notice.

Not only must the person prescribing have notice, but the interruption must have been "submitted to or acquiesced in" for one year after "notice thereof and of the person making or authorising" the interruption (section 4). It has been said that a natural inference from the facts that the owner of the servient tenement was responsible for the interruption is not "notice" within the meaning of the section: *Seddon* v. *Bank of Bolton*, 19 Ch. D. 462. But this rests solely upon a *dictum* of Fry, J., in the last-mentioned case. It is thought that little reliance should be placed upon it. The Act does not require that written notice should be given to the dominant owner (*a*) by the

(*a*) For brevity, this term is used throughout this article to denote a person who is enjoying the access of light to a window, light or opening regardless of the question whether such access has been enjoyed for the period of twenty years.

person causing the interruption. It would probably be held, for example, that the dominant owner would have notice of the person responsible for the interruption by reason of the display of a board on the servient owner's premises, giving the builder's name, even without knowledge on the part of the dominant owner that the builders in question were those normally employed by the servient owner or by any other person. For the section requires only notice of the person making or authorising the interruption, and interruption by a party who has no proprietary interest is just as effective as interruption by an adjoining owner: *Davies* v. *Williams*, 16 Q. B. 546. "Notice" and "knowledge" were contrasted in *Mildred* v. *Maspons*, 8 App. Cas. 888. But it was laid down in *May* v. *Chapman*, 16 M. & W. 355, by Parke, B., that "notice and knowledge" meant not merely express notice, but knowledge or means of knowledge to which the party wilfully shuts his eyes: a suspicion in his mind and the means of knowledge in his power wilfully disregarded; and see *Raphael* v. *Bank of England*, 17 C. B. 161, and Sir M. D. Chalmer's note to section 2 (1) of the Factors Act, 1889 (*Sale of Goods*, 9th ed., p. 160, under "Notice"). Similarly, it was said in *Bird* v. *Bass*, 6 M. & G. 143, that notice of an act of bankruptcy means "knowledge of it or wilfully abstaining from acquiring such knowledge". Perhaps this might be paraphrased as "a suspicion of the truth and a wilful determination not to learn it", although that phrase was used to indicate one of the two classes of *constructive* notice in the well-known case of *Jones* v. *Smith* (1841), 1 Hare at p. 55 (*b*). It is, however, thought that if A proceeds abroad (say) on war service and leaves unoccupied a house, he has no notice of an "interruption" unless he receives reliable information of it or of facts which would suggest further inquiry. A mere rumour from an irresponsible and unreliable source would not, it is submitted, saddle A with notice.

It is, at least, clear that the interruption will not be effective if the information which reaches the dominant owner is not sufficient to enable him to ascertain the person who has made or authorised the interruption; for the section only makes the interruption effective in law if the dominant owner has notice of the person who has "made or authorised" it (section 4).

Delay.

There are, however, few cases in which it is profitable for human beings to imitate the curious habit which the ostrich has of burying its head in the sand. Certainly if the owner of ancient lights desires to obtain a mandatory injunction he will be wise to ascertain as quickly as possible the identity of the person who is infringing or about to infringe his right to light. In relation to an application for an injunction it has been said that delay and acquiescence are very material when an injunction is sought in connection with disturbance of light: *Mott* v. *Schoolbred*, L. R. 20 Eq. 22. On the other hand, if

(*b*) However, constructive notice is "no more than evidence, the presumption of which is so violent that the Court will not allow even of its being controverted": *Plumb* v. *Fluitt* (1791) 2 Anst., at p. 438. If that is correct it would appear to be competent to the Courts to hold that the word "notice" (as distinct from "actual", "express" or "written" notice) in a statute may include constructive notice.

the defendant has hastened the completion of the obstructive building in order that the Court may be faced with a *fait accompli*, or has obtained the plaintiff's quiescence by sharp practice, the Court will not be deterred from granting an injunction to pull down the building if an injunction restraining its erection would have been granted: *Von Joel* v. *Hornsey*, [1895] 2 Ch. 774; *Daniel* v. *Ferguson*, [1891] 2 Ch. 27.

Bombed sites again.

We seen then, that if a building is destroyed and the site left bare the owner will not necessarily lose any right to light which he may have enjoyed in connection with the former building. We instanced above the case of a building having windows which had enjoyed the access of light for eighteen years. the building then being destroyed by enemy action. Of course, if the light has not been enjoyed for upwards of nineteen years the windows in the building are not protected if an adjoining owner chooses to obstruct them.

If, however, the enjoyment has been for a longer period the position is different. Even in war-time many buildings are erected for use in connection with services essential to the prosecution of the war; so it may well happen that the owner of the site of the destroyed building will receive information, either verbal, written or visual, that building work is commencing or about to commence upon neighbouring land. If this should happen the dominant owner should act promptly. Two classes of case fall for particular consideration:—

(a) *Where the action is taken by virtue of Crown prerogative, or by a competent authority under Regulation 50, 51 or 52 of the Defence (General) Regulations.*

In such cases, the Crown or the authority concerned and the owner of the adjoining site may be willing to offer to the dominant owner an undertaking or acknowledgment which will be sufficient to safeguard his rights pending the termination of the war. If not, the appropriate action would be a formal written protest accompanied by a statement that the dominant owner must not be understood to be acquiescing in or submitting to the interference with his rights; but that it would appear that he has no immediate redress, and is refraining from further steps solely for that reason. In due course he may possibly obtain compensation under the Compensation (Defence) Act, 1939, if he is unable, after the war, to secure the removal of the obstructive building. It is convenient here to point out (though it is deducible from what has been said above) that no alteration of the building of the dominant owner which occurs during the first twenty years of prescription will prevent the statutory period from running in favour of the dominant owner, if it would not have affected him after the right had become indefeasibly vested. In other words nothing is an "interruption" during the first twenty years if it would not be an interruption after the first twenty years, whether the right has or has not been the subject of litigation in which it has been called in question. Of course, this passage does not mean that A, who has enjoyed the access of light to a window for, say, eighteen

years, can object to the erection of a building on adjoining land. Whether A's building containing the window is or is not destroyed, the adjoining owner is obviously entitled to obstruct the access of light to it. The point here made is quite different. Suppose that B from time to time piles up packing cases on his adjoining land, but the height of the pile varies from month to month and sometimes causes no obstruction to A's window, the running of the prescriptive period is not affected, for there is no continuous interruption for any whole year: *Presland* v. *Bingham*, 41 Ch. D. 268. Similarly a temporary war-time building pulled down within a year of its construction would not prevent the prescriptive period from running.

(b) *Where the action is taken by an individual or individuals or other bodies not acting under overriding powers.*

Here the position of the dominant owner appears to remain precisely as it would be in peace time. Prompt action for the protection of his rights would appear to be necessary. In cases where an injunction would not appear to be obtainable owing to the comparatively slight interference with light which appeared to be in contemplation, the dominant owner would do well to seek an assurance that no further obstructive building would be erected without previous notice to the dominant owner, and confirmation of the measurements and position of the proposed building, and to claim payment of damages, if appropriate.

Mutuality.

It does not follow that a person (say A) who has a building containing ancient lights which is destroyed by enemy action is entitled to restrain his neighbour from erecting on the adjoining land any building "so as to constitute a nuisance" (the normal words employed in an order granting an injunction to protect rights of light). It may happen that the adjoining owner also had a building on the adjoining land, and that it was destroyed by enemy action. If, before such destruction, it was of such a height as partially to obstruct the light coming to A's building, A will not be entitled to be put in any better position in that respect by reason of the destruction of his building. If circumstances arise in which it is appropriate that the adjoining owner should be injuncted against interfering with the access of light to A's ancient lights the order may provide that the adjoining owner shall not erect any building on his site of a greater height than the buildings which formerly stood on his said site, "so or in such manner as to darken injure or obstruct A's ancient lights": see *Martin* v. *Price*, [1894] 1 Ch. 276.

Abandonment of ancient lights.

A number of cases may be found in connection with the evidence of abandonment of the right to light; but the true rule is that the question is always one of fact.

It was said in an old case that when an ancient window has been bricked up for twenty years the right to light is lost: *Lawrence* v. *Obee*, 3 Camp. 514. That is, however, in some respects an over-

statement and in other respects an understatement. If the dominant owner so acts as to lead others to assume that he no longer requires the access of light to a former window, and knowingly permits an adjoining owner to erect an obstructive building, he may find that he will be treated as having abandoned his right, even though he had only ceased for a short time to make use of the window; cf. *dicta* in *Moore* v. *Rawson* (1824), 3 B. & C. 33 (where, however, the claim was made about seventeen years after the existence of the windows had ceased, and three years after the adjoining owner had erected his building). On the other hand, if the dominant owner makes it clear (*e.g.*, by written notification to the adjoining owner), that although he is ceasing to use or blocking up the window for the time being, he may later wish to renew the use of the window, there can be no presumption of abandonment (or release) of the right to light, at any rate for a reasonable period of time. Obviously the dominant owner, if prudent, would repeat the warning to any person subsequently acquiring the adjoining owner's land; but it does not follow that he would be obliged to do so in order to preserve his right. The question is whether the dominant owner has by his conduct shown an intention to abandon the right. Thus, it was held where an old barred window was blocked up and left so blocked up for nineteen years, but the window bars were left in position, that the right to light was not lost, because it could be seen from the existence of the bars that windows had formerly existed in that position, and there was no evidence, apart from the lapse of time, which was not conclusive, that the dominant owner intended to abandon his right: *Stokoe* v. *Singers*, 8 E. & B. 31.

Plans.

If, however, the dominant owner by making alterations so confuses the evidence that he cannot prove the identity of the light which he claims he will lose his right: *Scott* v. *Pape*, 31 Ch. D. 554. This brings us to the question of plans in connection with buildings destroyed by enemy action by way of preservation of evidence. The old case of *Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. 213, shows the value of the taking of plans as evidence of an intention to preserve the right to light upon the demolition of the building.

One of the best known modern cases is *News of the World* v. *Fairhead*, [1931] 2 Ch. 402, in which Farwell, J., observed that the mere lack of evidence of intention to preserve ancient lights did not prove an intention to abandon the right to light, even where, on reconstruction, the amount of coincidence between the old and the new windows is small. It is obvious that failure to rebuild under the conditions now prevailing is no evidence that the owner of the former buildings does not wish to preserve his rights in respect of windows in a demolished building even if it has been demolished voluntarily. Where the demolition has been caused, directly or indirectly, by enemy action the assumption would be even stronger that such rights were intended to be preserved.

Suspension of prescription.

So far we have considered only the position of the person (say X) who has acquired or is in course of acquiring a right to light, without

referring to the possibility that there may be a conflict between the interests of X and of his neighbour Y. It may, however, happen that X, owning 12 Smith Street, demolishes that property, or that the enemy carries out the same operation for him, whilst 14 Smith Street owned by Y remains. Suppose that there are windows which have existed in No. 14 for eighteen years. In one year's time the right to light in respect of the windows in No. 14 will become absolute in the sense that no sufficient "interruption" can occur to prevent twenty years' enjoyment. Such cases have probably already occurred during the present war. Nor would it be an easy matter for the owner of No. 12 to obtain the necessary materials for the erection of a high screen to obstruct the access of light and thus to stop the running of the prescriptive period in favour of the windows of No. 14.

During the last war provision was made for such cases by section 3 of the Courts (Emergency Powers) (No. 2) Act, 1916. The Court was empowered to suspend the running of the prescriptive period in respect of windows, where the adjoining owner was prevented from building by reason of circumstances attributable to the war or because the necessary Treasury consent could not be obtained. The period of suspension could not be more than six months from the end of the war.

The present writer has not observed any report of a case in which that section was invoked where a building had been demolished by enemy action. There is, however, a report of a case in which a certain company had demolished their building in the early part of the war. The Treasury would not consent to the construction of a new building on the site during the war. It would seem that the new building would have interfered materially with the flow of light to certain windows in neighbouring buildings. Those windows would shortly have enjoyed for the requisite statutory period the access of light. The Court ordered that the period commencing on May 25, 1916, and so long thereafter during the continuance of the war as the conditions mentioned in section 3 (a) of the above mentioned Act should continue or until six months after the end of the war, whichever was the shorter period, should be excluded in computing the period of enjoyment of light required to obtain a prescriptive right in relation to the above-mentioned windows in the neighbouring premises (*Re City of London Real Property Co., Ltd.*, [1917] W. N. 183). It will have been observed that in the last-mentioned case the neighbouring windows must have been enjoying the access of light before the demolition of the applicant's building. Otherwise a prescriptive right could not have been obtainable within so short a time after the demolition by the applicant company of its building. From the facts given in the note of the case it would seem that the applicant company were intending to erect, or to preserve the right to erect a building which would have obstructed the windows in the neighbouring premises to a greater degree than they had been obstructed by the applicants' former building (*i.e.*, before its demolition). The section would, however, have been equally appropriate if the applicant company had not previously built on the site in question.

Again, the section would have applied if the applicants' building had not been demolished and they wished to raise the height of, or to

extend, the building, so as to affect the light coming to the windows in the neighbouring premises, but were unable to do so owing either to circumstances attributable to the war or to the refusal of the Treasury to sanction the expenditure.

Legislation required.

The present writer is not aware of any similar provision in any emergency statute passed during the present war; and the Act of 1916 has long since ceased to be in force. It may be assumed that there will be quite an appreciable number of cases in which owners of land have already lost, or will, before the war ends, have lost the right to build or enlarge their buildings so as to obstruct materially the access of light to windows in adjacent premises owing to the prohibition of substantial building works (other than works necessary for the efficient prosecution of the war). The writer has ventured to suggest a substantial change in the law concerning light screens in the concluding portion of this article, but the question of suspension of the prescriptive period retrospectively would require consideration, even if the suggested change were made.

If the Legislature should think fit to make provision for such cases, in the same manner as it did during the last war (at a much earlier period), the following points are perhaps worthy of consideration:—

(1) The suspension of the prescriptive period might be made operative retrospectively, say, to the date when it became unlawful to execute building work costing more than £100 without the consent of the Minister of Works, and might continue until at least six months after it becomes reasonably practicable for the site owner to complete the erection on the site of a building (or the alteration of any existing building on the site) in such a manner as to obstruct the access of light to the windows in question.

(2) It would be desirable to define the meaning of the term "reasonably practicable". Possibly it should not be considered reasonably practicable to commence the erection or alteration of a building whilst the requisite work could only be executed with the consent of the Minister of Works or of some other officer or authority or whilst the requisite labour or materials were available only at such cost or under such conditions as would render the execution of those works impracticable or inexpedient.

(3) Under the Act of 1916, above mentioned, persons who would be adversely affected by the running of the prescriptive period could obtain relief only at the expense of an application to the Court. It is not clear that this precedent should be followed. Automatic suspension along the above lines might be reasonable, subject to the power of the Court to make variations, and to decide whether, at any given date (*query* not a past date) it was "reasonably practicable" to execute obstructive works (see above).

(4) It might be equitable to provide that any person having an interest in the determination of the question whether it was reasonably practicable to commence the execution of

obstructive works should be entitled to serve a notice on the site owner calling upon him to admit that it was reasonably practicable for him to commence the execution of obstructive works—failure to serve notice of admission or denial to operate as an admission or denial, as the Legislature may think proper. If such failure is to rank as an admission it would be desirable to provide that the notice requiring the admission should state the effect of failure to reply to it. An admission should be conclusive and binding; but in the case of a denial the matter could be left for resolution by the Court on the application of any interested party (including the site owner). In such a case it is thought that it would be equitable to permit the Court to make an order determining that it was reasonably practicable to commence the erection of an obstructive building at a past date, not being earlier than the date of service on the site owner of the notice above mentioned.

Practical observations.

However, no such legislation exists at the present day. Those who have read so far may ask: "What is to be done under the present conditions, if A wishes to prevent B's windows from becoming ancient lights where B's windows have existed for say eighteen years?" The answer is that (apart from the possibility of litigation) B may be willing when approached to enter into the usual agreement whereby it is acknowledged that the access of light is enjoyed solely by licence from A, and not as of right. Thus, time will cease to run, and if it ceases to run (*i.e.*, if the agreement continues in force) for a full year B will have to commence *de novo* to build up the period of prescription. Again, B may be willing to agree by deed with A that the period of prescription shall be suspended for a given period, possibly until one year after the termination of the war. If so, the phrase "termination of the war" will require to be carefully defined. The war which ended physically in 1918 did not end in law until August, 1921. Nor did the war with Germany end at the same time as "the war" generally. Moreover, an Act which was passed in 1918, the Termination of the Present War (Definition) Act, 1918, gave an arbitrary definition for the purpose of documents between parties as well as statutes and orders, which definition applied in the absence of any context to the contrary. That Act probably did more harm than good in relation to contracts and other dealings between parties; for the date thus fixed was the most distant date at which anyone could possibly have imagined that the war would be deemed to have ended, *i.e.*, in August, 1921. Whether parties had referred to the end or termination of the war or of "hostilities" the result was exactly the same, in the absence of any context, though it is obvious that in many cases in which parties had referred (without context) to the duration of "hostilities" they had meant actual physical hostilities and not a period ending nearly three years after physical hostilities had ceased. Only one Judge (McCardie, J.) appears to have had the courage to regard the general nature of the transaction and its subject matter as "context" in order to arrive at a common-sense result: see *Ruffy Arnell & Co.* v. *R.*,

[1922] 1 K. B. 599. However, in another case the term "the war" was construed as meaning the war between His Majesty and Germany which substantially shortened the period, for that war officially ended on January 10, 1920, more than one year and seven months prior to the official termination of the whole of the Great War: see *Re Rawson* [1921] 90 L. J. Ch. 304.

Effect of acknowledgment or deed.

It seems doubtful whether any method can be devised whereby a *subsequent* owner can be automatically bound by an arrangement between his predecessor and an adjoining owner that the access of light to windows of the building of the predecessor shall be deemed to be enjoyed by the consent of the adjoining owner. The term "automatically bound" is used in the last sentence to indicate that such an arrangement cannot be made to run with and bind the land. Any person purchasing the land containing the windows without notice of the agreement will not be bound by it *so far as concerns the future.* Such an agreement is nevertheless valuable, because any immediate successor in title of the person who has given the acknowledgment will normally lose the benefit of the previous years during which the prescriptive period would otherwise have been running in his favour. Thus, on January 31, 1924, windows are placed in A's building. In March, 1925, A gives to his neighbour B an acknowledgment that the access of light to those windows is enjoyed by the agreement and consent of B and agrees to pay, say, one shilling per year in respect of such enjoyment so long as the agreement remains in force. On July 31, 1940, A sells to C the building containing the windows. Now if C knows nothing of the agreement, pays no acknowledgment rent and enjoys the use of the building and of the windows in it for a period exceeding nineteen years *from the date on which the building is conveyed to him* he will acquire a right to light which cannot be defeated. B will, however, have derived considerable benefit from the agreement. For, if there had been no such agreement, C would have acquired a right to light in February, 1943, instead of having to wait until August, 1959. It is sometimes said on the authority of *Bewley* v. *Atkinson* (1879), 13 Ch. D. 283, that if the purchaser of the building containing the windows purchases it with notice of the agreement he is bound by it. But such a statement is misleading; for the true position is as follows. Whether the purchaser buys with notice of the agreement or learns of the agreement after he has purchased the property, he can repudiate it if he wishes to do so. What *Bewley* v. *Atkinson, supra,* shows is that if A enters into such an acknowledgment agreement and undertakes to pay a periodical sum for the enjoyment of the access of the light during the subsistence of the agreement, and B purchasing from A, but signing no new agreement nevertheless pays the rental he will be bound by the agreement so long as he continues to pay the rental. But if B wished to repudiate the agreement there would be nothing to prevent him from doing so: *Greenhalgh* v. *Brindley,* [1901] 2 Ch. 324. Moreover, in *Bewley* v. *Atkinson, supra,* the majority of the Lords Justices were of the opinion that the acknowledgment agreement would automatically be avoided if B enjoyed the light for twenty years without giving any new

acknowledgment or confirming the old one, and without paying the acknowledgment rental. Consequently B would then be entitled as of right to light flowing to the windows in question. See further on this subject, and as to agreements to block up windows, *Smith* v. *Colbourne*, [1914] Ch. 533.

SUGGESTED LEGISLATION.

It has often occurred to the present writer that an adjoining owner who is unable to obtain from his neighbour an acknowledgment that the neighbour's windows enjoy light only by his kind permission is forced to adopt a very unneighbourly course of action. Many people are reluctant to sign admissions or to incur legal expenses when it appears that the simpler and possibly the more masterly course is to remain inactive. In other cases the interested parties are not all available or are not known. The result is that it is often necessary for a site owner who wishes to protect his building rights to erect a high screen to shut out the light flowing to modern windows overlooking (*c*) the site in order that those windows may not become "ancient lights". Is not this a case in which the normal man or woman who owned the building containing the windows would prefer to take the will for the deed? Moreover, to a wealthy man or company owning a site or building the expense of erecting and maintaining a high screen might be a matter of little moment. It does not follow that a poor man owning a plot of land could easily afford to erect or maintain such a screen. At the present time it might be difficult to obtain the labour and materials required for the erection of a substantial screen. And if the expense of the work exceeded £100, it is quite likely that the consent of the Minister of Works would be withheld.

In these circumstances is it not possible that the Legislature might be persuaded to abandon the policy of *ad hoc* measures, and to make a change in the general law, along the following lines:—

(1) Instead of erecting a screen a substantial notice board would be erected on the land (or affixed to a building) facing the building containing the prescribing windows, lights or openings. That board would bear the legend "Notice as to lights" in very prominent lettering. Thereunder particulars would be given of the windows, lights or openings to which the notice related, and of the exact dimensions and position of a screen which the person thereunder mentioned should be deemed to have erected; and the date of the erection or affixing of the board would also be stated on it.

(2) The last-mentioned person would be deemed to have erected on the last-mentioned date such a screen as is mentioned in the preceding paragraph.

It may be pointed out that no notice need be given when a screen is erected, and that it is often difficult to ascertain the whereabouts of all persons who may have interests which would be affected by the erection of a screen. Careful consideration should, therefore, be given to the question before any obligation to notify persons affected by the

(*c*) The writer is aware that windows do not "look", "underlook" or "overlook"; but the use of the verb "overlook" in this connection is so usual that only a slight apology is offered.

notice board is imposed on the person erecting or affixing it. Probably it would not be unreasonable to require that the person erecting or affixing the notice board should notify the occupier (if any) of the building or, as the case may be, the portion of the building containing the windows, lights or openings. Notice by registered post addressed to " the occupier ", without specifying any name, should be sufficient, as it is sometimes difficult to determine what is " occupation " in law, even if the name of the apparent occupier is known.

The saving of wood which would result from such a scheme, over a period of years, would be substantial. As to the immediate benefit this is obvious, though it is not known by the writer whether the immediate saving of wood would be appreciable in quantity. It is suggested that the statute making this change should provide for the substitution of notice boards for existing screens, in order that such screens might be available as salvage. It may be that there are some light screens which would not be of substantial value as salvage. If so, the obligation to substitute a notice board, which should be required to be constructed out of part of the material constituting the screen, could be made to apply to screens of a specified minimum size and/or of specified materials. Some brick or other permanent walls or structures may have been erected with the intention that they should remain indefinitely in their present condition for some purpose other than the obstruction of light, *e.g.*, that they should form part of a building or other structure to be erected later. Probably such walls should be exempted from the provision requiring the substitution of a notice board. Again, screens necessary for the preservation of privacy in relation to any business or activity and which happen also to serve the purpose of light screens should presumably not be compulsorily removable. The necessary machinery for the delivery up and collection of the salvaged material could readily be devised. Finally, if it is thought desirable, it *could* be provided that after the termination of the present emergency the site owner shall have the option of erecting (or re-erecting) a screen instead of a notice board; but it seems doubtful whether such a provision is desirable. If, however, it is intended that screens should not be erected solely for the purpose of preventing the acquisition of rights of light, an express prohibition would be necessary. Otherwise the site owner would retain his common law right to erect anything which he cared to erect upon the land, subject of course to restrictions imposed by statute or requirements, regulations or by-laws arising thereunder.

PERPETUITIES (*a*).

A new edition of *Gray on Perpetuities* (after nearly thirty years) is an event in the world of conveyancers. Whether or not we agree with the conclusions of the late Professor Gray we must at least consult them, and few works of comparatively recent origin (the first edition appeared in 1886) enjoy such authority in the Courts.

This edition, the first not to be edited by the learned author, happily avoids too much deviation from the author's text but incorporates additional learning with industry and fidelity to the original arrangement. Perhaps for American readers this method presents less of a problem than for English lawyers. America has not suffered the cataclysmic upheaval of the Property Legislation of 1925. These changes have not been ignored by the learned editor, who indeed is to be congratulated on his mastery of learning not directly concerned with his own sphere of practice, but they appear rather in the form of footnotes to the text. We think that in an American book we could not expect more from the editor, who shows a remarkable familiarity with the up-to-date English literature as well as cases on his subject-matter. Just occasionally, however, we are faced with an emphasis that seems strange. Both by virtue of the provisions of the Settled Land Act and the trend of decisions English lawyers, perhaps somewhat uncertainly, are turning to the view that a determinable fee can exist. The whole argument in *Gray* is away from any such view. We have picked out a point that may appear somewhat remote from the problem of perpetuity, for the application of perpetuity, if any, to the determinable fee is at least problematical, to emphasise that *Gray* is something more than a work on the Perpetuity Rule as such. It is in no small degree the leading authority on the subject of contingent interests in property. And here we do come to a peculiarity in the frame of the book which the modern English law has emphasised. Though Gray rightly insists that a true vested interest is scarcely ever affected by the Perpetuity Rule the chapter on Vested and Contingent Interests does not contain any general discussion on what is sometimes a very difficult question, namely, whether an interest is or is not vested. So, for example, the rule in *Phipps* v. *Ackers*, 9 Cl. & F. 563, recently applied to personalty in this country, *Re Heath*, [1936] 1 Ch. 259, does not appear anywhere in *Gray*. This is due to the predominance of the old rules governing the creation of interests in expectancy. It is really at this point that the American law has now in fact parted company with the modern law in this country.

The learning on the old law of estates in expectancy will continue to be of importance for many years to come unless further catastrophic changes are made in our land law. This fact has tended to obscure the really vital changes that have been made, indirectly it may be, in our own law. We still talk of reversions, remainders and executory limitations, and it may be, for reasons hereafter given, that this classification may in some cases be of importance. Nevertheless, our

(*a*) *Gray on Perpetuities*. 4th ed. by ROLAND GRAY. Boston: Little, Brown & Co. Selling Agents in England: Sweet & Maxwell, Ltd. 1942. Price £3 3s. net.

readers may find a brief summary of the modern position convenient to be borne in mind when using such a work as *Gray*, invaluable as that still remains.

By the Law of Property Act, 1925, s. 1 (3), "all other estates, interests, and charges in or over land take effect as equitable interests". No expectant interests in freeholds can possibly take effect at law as legal estates, and it has been assumed that the effect of this provision is to remove from existence the special rules governing legal contingent remainders. Such a construction is certainly consistent with the provisions of Schedule I, Part I, although it is submitted that it could be argued that its effect is to make what would otherwise be a legal contingent remainder operate as such but only in Equity. I have never seen this seriously argued nor do I think that the Courts would uphold the argument, though the result of converting all future contingent remainders into equitable interests is not so universally satisfactory as seems sometimes to be assumed.

First, the effect of this alteration appears to remove any practical distinction between the effect of creating a reversion or an equitable remainder. The old distinction that a reversion created tenure between the reversioner and the owner of the particular estate can scarcely subsist in equity since tenure is a Common Law doctrine. It is true that a reversion must be vested and a remainder need not, but the change has only affected the question for determining whether or not an interest is vested.

Gray, indeed, maintained that no equitable future interest could be a remainder (see p. 356) or a reversion (see p. 109) and the learned editor does not appear to have qualified this statement. To accept it and also to accept the usual interpretation of the L. P. A., s. 1 (3), would be to assert that since 1925 it has been possible only to create interests in the nature of executory limitations. This would, indeed, be a simplification of the law, which is perhaps very nearly true. And it is now our purpose to examine how far it is possible completely to disregard the distinction between the types of expectant interest other than that arising from their being vested or contingent.

Gray's doctrine is founded on the fact that a reversion in equity is only a resulting trust and a remainder at Common Law was developed out of the doctrines of tenure and seisin which were foreign to the system of Equity. Admitting this all to be true, and in particular admitting that in the case of reversions it is wholly true, nevertheless the English Courts have not adopted a doctrine that an equitable remainder is less a remainder because it operates only in Equity. It is true that Equity Judges, disliking the niceties of seisin, modified the rules governing the destructibility of contingent remainders, nevertheless the Courts have tended to follow the law save in this respect. It would be inconsistent with the history of Equity in its development of property rights had they done otherwise. So, for example, and examples that have important modern implication, the Courts applied to equitable remainders both the rule in *Shelley's Case: Venables* v. *Morris*, 7 T. R. 342; and the rule in *Whitby* v. *Mitchell: Re Nash*, [1910] 1 Ch. 1. It was, indeed, partly upon the reasoning applicable to *equitable* contingent remainders that Farwell, J., persuaded himself to hold that the Rule against Perpetuities applied

to legal contingent remainders: see *Re Ashforth*, [1905] 1 Ch., at p. 545, notwithstanding a strong body of authoritative professional opinion to the contrary: see *Challis R. P.*, 3rd ed., p. 213.

The vital distinction in the rules governing them between a legal and equitable contingent remainder, which led to Gray's assertion, was that a legal contingent remainder which did not vest in interest during the continuance of the particular estate failed to vest at all. An equitable contingent remainder might vest subsequently to the determination of the particular estate, the interest in the property in the meantime resulting to the settlor: *Eddels' Trusts*, L. R. 11 Eq. 559. The operation of this distinction and its effect upon the modern law form the most important part of this discussion, but it is submitted that its existence does not warrant the view that an equitable contingent remainder was any the less a "remainder". The question is not, perhaps, as academic as it appears. It is submitted that for both types of remainder it was essential that the remainder should be limited to take effect after the determination of a prior particular estate which supported it, and furthermore, if a limitation could be construed as a remainder it should be so construed under the rule in *Purefoy* v. *Rogers*, 2 Wms. Saunders 380, notwithstanding that a contingent remainder might vest beyond the period at which the prior estate determined. The immediate point of this observation lies in a peculiar application of the Perpetuity Rule, namely, that where a limitation itself within the rule depends upon a contingent limitation void for perpetuity the first-mentioned limitation fails even though it be vested (notwithstanding the contrary opinion of Gray, see §§ 251—258); see *Re Abbott*, [1893] 1 Ch. 54; *Re Hewitt*, [1915] 1 Ch. 810. It is submitted that if a limitation is by way of remainder it must be dependent on any prior estate and consequently will suffer if such prior estate is void for remoteness. Nevertheless, it is difficult to reconcile such a doctrine with the decisions in *Re Canning*, [1936] Ch. 309, and *Re Coleman*, [1936] Ch. 528. In the case of executory limitations the question of dependence of one limitation is more direct and should not give rise to the same difficulty of construction. If the two last-mentioned cases may be regarded as destroying for this purpose, at least, the implication to be drawn from the law of remainders the assimilation between executory limitations and remainders becomes more complete.

Although it may not always be appreciated the principal difficulty of the Rule against Perpetuities does not lie in the Rule itself, but in the rules governing the vesting of contingent interests. Thus, in *Re Legh*, [1938] Ch. 39, a gift over to a survivor of tenants in common could have been either inside the rule or void for perpetuity depending solely upon the date at which the survivor took a vested interest. Consequently, the distinction between legal and equitable contingent remainders in the rules governing vesting presented, in fact, one of the greatest problems in the application of the Perpetuity Rule, assuming, as we think we now must, that the Perpetuity Rule did apply to legal contingent remainders.

Suppose a limitation to A (a bachelor) for life and subject thereto to the first son of A to attain twenty-five. On the face of it such a limitation looks bad for perpetuity since clearly A's son may attain

twenty-five more than twenty-one years after A's death and A is the only life in being. So, in *Re Robson*, [1916] 1 Ch. 116, a similar limitation was held to be void for perpetuity in respect of an equitable contingent remainder, since the rule for vesting permitted the interest to vest as and when the contingency happened. Had A died before any son attained twenty-five the interest would have resulted pending the happening of the contingency. On the other hand, as a legal contingent remainder the interest of A's first son to attain twenty-five would have been valid: cf. *Symes* v. *Symes*, [1896] 1 Ch. 272. This was due to the rule that unless the remainder vested during A's lifetime it failed and consequently it could not possibly vest outside the period.

To this was added the further peculiarity illustrated by *Symes* v. *Symes* (*supra*) that a class gift would not fail for perpetuity if limited after a prior estate to a life in being, because no matter what contingency determined the ascertainment and vesting of the interests of members of a class only those members who took a vested interest during the prior estate took at all. So, to complete our earlier example, a limitation to A (a bachelor) for life and subject thereto to such of A's children who should attain twenty-five would have the effect that only those of A's children who attained twenty-five in A's lifetime would take. This is clearly not contrary to the Perpetuity Rule. As an equitable contingent remainder any child of A who attained twenty-five, whether or not in A's lifetime, would take: cf. *Re Chartres*, [1927] 1 Ch. 466. Such a limitation would offend the Perpetuity Rule. Indeed, in the case of equitable interests including executory limitations the position might be even more likely to create a perpetuity, because where the prior estate was limited to a life other than the parent of the class it was not necessary for any member of the class to be born during the continuance of the prior estate: cf. *Re Paul's Sett. Trusts*, [1920] 1 Ch. 99.

The consequence of the change from legal to equitable remainders, therefore, primarily shifts remoteness from the rules of vesting to the nature of the contingency. Having ascertained that an interest is contingent, not always an easy question, the remaining problem is the possible date at which the contingency may happen so as to confer a vested interest.

So stated, the framework of any modern English book on Remoteness would be very much simplified. Clearly matters arising from the old classification of expectant interests would form properly only an appendix. But, unfortunately, there were other complications which have not been entirely eliminated.

First, the rule in *Shelley's Case* applied to equitable contingent remainders though it did not apply to executory limitations: *Challis R. P.* (3rd ed.) 165. This rule, in fact, had the effect at times of avoiding remoteness. So, a limitation to A for life followed by a limitation to his eldest unborn son for life followed by a limitation to the heirs of the body of the unborn son would confer upon the unborn son an estate tail that was unquestionably valid. By the Law of Property Act, 1925, s. 131, the rule in *Shelley's Case* is abolished and it is provided that, where otherwise it would have applied, the words which would have conferred an estate in fee simple or an entailed estate shall operate in equity as words of purchase and not of

limitation. This provision is not in fact easy to construe. In a will containing a limitation to A followed by a limitation in remainder to A's "issue for ever" it was held that A took an estate tail: *Re Hammond*, [1924] 2 Ch. 347; but to-day "issue" does not, even in a will, create an entailed interest: L. P. A., s. 130 (2). Nevertheless, from the point of view of perpetuity the effect of turning the words into words of purchase may have the effect of destroying the ultimate limitation altogether. So, in the example first given in this paragraph, "to A for life remainder to his unborn son for life remainders to the heirs of the body of the unborn son" the final remainder would now be void for remoteness and A's unborn son would take a life interest only. It is conceived that any similar limitation created by executory limitation would always have had that effect.

Having regard to possible difficulties in the construction of section 131 it may be going too far to suggest that the distinction between executory limitations and remainders created by the rule in *Shelley's Case* has now been abolished. Nevertheless, from the angle of Perpetuities its abolition appears to remove the distinction.

Another distinction between remainders and executory limitations appears to be in the rule in *Whitby* v. *Mitchell* which Gray was at such pains to criticise. This rule rendered void an attempt to limit by purchase an estate to the child of an unborn person following a limitation to the unborn person. I do not know that it has ever been expressly held that the rule did not apply to executory limitations, but by reason of the form of the rule and of the application of the rule in *Purefoy* v. *Rogers* it is improbable that any limitation to an unborn person followed by a limitation to the issue of such unborn person would constitute anything but a remainder. In any event the distinction has, at any rate in large measure, been removed by the abolition of the rule in *Whitby* v. *Mitchell*: L. P. A., s. 161. This abolition does not, of course, validate the ultimate limitation unless it otherwise complies with the perpetuity rule. Normally such a limitation would be void, but whereas the rule in *Whitby* v. *Mitchell* was absolute, it is possible now by the use of an appropriate proviso to create such a series of limitations without offending the perpetuity rule: see *Key & Elphinstone* (14th ed.), p. 944. Consequently, notwithstanding the decision in *Re Nash*, [1910] 1 Ch. 1, equitable contingent remainders have been brought into alignment with executory limitations.

We cannot, however, leave this question without raising an issue that the Law of Property Act, 1925, has left open. In devises, though not in deeds, the Courts allowed a certain relaxation of the strictness of the rule in *Whitby* v. *Mitchell* under the doctrine of *cy près*. A gift to an unborn person for life with remainder to his children in tail, either successively or as tenants in common with cross remainders (*Vanderplank* v. *King*, 3 Hare 1) gave the unborn person an estate tail, and if the remainder was to the children in tail male, the unborn person took an estate tail male: *Re Mortimer*, [1905] 2 Ch. 502. The doctrine did not apply to a remainder in fee (*Hale* v. *Pew*, 25 Beav. 335), nor to a remainder for life: *Humberston* v. *Humberston*, 1 P. Wms. 332. It has been laid down that the doctrine is not to be extended, but it is material to consider whether, in view of the abolition of the rule in *Whitby* v. *Mitchell*, the doctrine still exists.

Gray's view was that the doctrine of *cy près* applied to this form of limitation was an exception to the Perpetuity Rule, which he discussed at considerable length (see pp. 608—619). It was an exception because normally the Perpetuity Rule is applied only after the effect of the limitation independently of the rule has been ascertained, but the obvious purpose of the rule seemed to be the exclusion of a perpetuity. The view that it is an exception to the Perpetuity Rule depends in part upon the assumption, made elsewhere by Gray, that the rule in *Whitby* v. *Mitchell* rested upon no sound foundation and did not represent old law. But the view could be more legitimately supported by reference to the fact that it seems to have started from the construction of executory trusts and then to have been applied to direct devises. Indeed, it might be treated only as a method of construing wills that has assumed something in the nature of a legal rule. Nevertheless, Gray's view of the doctrine was completely rejected by the learned editor of *Challis*, who said (3rd ed., at p. 118): "The notion that the doctrine of *cy près* is an exception to the modern Rule against Perpetuities is quite inadmissible and indeed unintelligible." But Sweet, like Challis, was never prepared to allow that the "Modern Rule" could apply to legal contingent remainders. In fact, the doctrine of *cy près* must have been developed independently of the modern rule, because whatever may now be the law it seems quite impossible to maintain that in the late eighteenth century, when the doctrine began its career, the Judges contemplated the application of the Perpetuity Rule to legal contingent remainders.

Two possibilities remain. The doctrine can be regarded as an exception to what is now known as the rule in *Whitby* v. *Mitchell*. It is submitted that this is in line with at least the older text-book authorities from Fearne onwards and including the Real Property Commissioners. To adopt this view seems inevitably to draw the conclusion that it has ceased to apply in English law. The abolition of a rule surely should be held to destroy any exception to it since it appears impossible to have an exception to a non-existent rule.

The alternative view would be that the doctrine is an independent rule of construction for wills. Having regard to its origin in executory trusts this is an attractive proposition and leaves the doctrine untouched directly by the 1925 legislation. The question then remains whether it can survive the precise provisions of section 130, which by section 130 (2) are made to apply to executory as well as executed trusts. To take an example, namely, a devise is made to the "eldest (unborn) son of A for life with remainder to the issue of such son in tail". Are the words here used "like expressions as those by which before the commencement of this Act a similar estate (*viz.*, an estate tail) could have been created by deed (not being an executory instrument)"? If no estate tail is created the remainder is clearly void for perpetuity, but can the doctrine be applied to save the ultimate limitation and give practical effect to the intentions of the testator? Here the like expression (in tail) has been used, but it has been limited after a gift which in a deed would not have been effective to create an entailed interest in the eldest son. If, as seems probable, the term "like expression" were intended to apply only to the use of words of limitation, such as "heirs of the body" or "in tail", there is no

insuperable difficulty in applying the doctrine of *cy près* to our example. But if the limitation as a whole must be capable of taking effect in a deed prior to 1926 the doctrine is certainly excluded.

We can only leave the argument in an inconclusive state. It is a problem that may well arise, but we think that only the Court can determine the solution. However we look at it, the question of whether or not the limitation is valid cannot be determined by reference to its character as a remainder or executory limitation. It may be valid only if it is a remainder, but the fact that the limitation is a remainder is no guarantee of its validity.

We can, therefore, summarise our conclusions that so far as Perpetuities are concerned the distinctions between reversions, remainders and executory limitations have ceased to have point. On the other hand, the rules of construction determining the character of contingency have received an added importance. And here we may revert for a moment to the discussion of determinable fees.

Gray maintained that since the statute *Quia Emptores* it was not possible at Common Law to limit a determinable fee. This view was opposed to that of a number of English writers, such as Preston and Challis. With some justification Gray points out that some examples given by Challis might properly be regarded as executory limitations and that the only very modern authority (*Re Leach*, [1912] 2 Ch. 422) might be put under this head, and in any event the ultimate destination was by way of resulting trust. In *Re Chardon*, [1928] Ch. 464, an analogous interest was held to exist in a trust of personalty, provided that there is in effect a resulting trust to the grantor. Gray is prepared to admit the validity of equitable interests as determinable fees, since the statute *Quia Emptores* does not affect the question of tenure here, whereas he regarded a possibility of reverter on a determinable fee as involving tenure. Since a possibility of reverter was never regarded as an estate, it is not quite clear upon what his point concerning tenure rests.

The vital point, however, is whether a determinable fee not only exists but that the possibility of reverter can be effective at a time too remote for perpetuity. The answer to this point should lie in determining whether or not a possibility of reverter is a vested interest. If it is, then, as Gray points out (at p. 46), it cannot be void for remoteness since the Rule is not concerned with the period of a limitation but whether or not it is vested within the time allowed. This view seems to have commended itself to the learned Judge in *Re Chardon* (*supra*). Since a possibility of reverter cannot be reserved save in favour of the grantor or the residuary estate of a testator the position should be unchallengeable. Indeed, the older English authorities take the view that the Perpetuity Rule does not apply, because it never has. The difficulty lies in the recent application of the Rule to rights of entry reserved on an estate on condition : *Re Hollis's Hospital and Hague*, [1899] 2 Ch. 540; and see *Re Da Costa*, [1912] 1 Ch. 337. Although for English law this latter question has been settled by statute (L. P. A., s. 4 (3)), the decisions were consistently challenged : see *Challis R. P.* (3rd ed.), p. 207. It is submitted that the application of the Rule to rights of entry must be regarded as an exception to the general rule that only a contingent

interest can be void for remoteness and it must be conceded that it is not impossible that if determinable fees are used to any extent, outside the sphere of charitable trusts, the Courts may, on analogous reasoning, provide another exception.

The points that we have discussed do not, of course, exhaust the problems of Perpetuity. There is, for example, the whole field of powers which is of increasing importance and coupled with it the difficult branch of learning connected with the vesting of class gifts. This topic is rendered more intricate because of the rule that an interest must not only vest within the period but the extent of the interest must also be ascertained within that time limit: *Pearks* v. *Moseley*, 5 App. Cas. 714. But these matters have not been affected, save indirectly, by the wholesale abolition of the old rules governing contingent remainders.

All that we have tried to do is to emphasise that in this country and in respect of many of the modern limitations which call for consideration in connection with remoteness it is now necessary to approach the problem rather differently from the old law. Gray will, of course, remain an authority constantly to be consulted. Nevertheless, we must pick our way with care. The framework into which our law is now cast is different from that when Gray wrote. Any decision prior to 1926 must be tested in the light of the then prevailing rules for the vesting of contingent interests and, indeed, for the validity and effect of such limitations independently of the Rule against Remoteness. It is too early yet to say what effects the changes made in the law may have upon the nature and effect of a contingency inserted in priority to some gifts, but this has become the dominating question for the law.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Perpetuities—uncertainty of period—"termination of present war"—lives taking no interest under settlement.—The Perpetuity Rule requires that a contingent interest shall vest in interest, though not necessarily in possession, within a period of ascertained lives in being and twenty-one years after the death of such lives or, if there be no lives ascertained for the purposes of the rule, within a gross period of twenty-one years. The problem of ascertained lives has already been discussed in this Journal in some detail (*ante*, Vol. 6, pp. 191 *et seq.*), but the subject remains open to development. The period of twenty-one years would appear to be definite enough, but in fact it must be borne in mind that settlors and testators rarely have the rule in mind and it is where it is overlooked that difficulties arise. The essential point is that the contingency must be so defined that it is *impossible* for it to occur beyond the period of the rule. Recently, there have been two cases illustrating these different aspects of the rule.

In *Re Engels*, [1943] 1 A. E. R. 506, Uthwatt, J., held, as a matter of construction, that a bequest by will constituted a gift of income to a Church Fund with a gift over of the corpus if "after the termination of the present war" the services in the church were not held in the German

language. The gift over was in favour of the residuary estate which was not held for a charitable purpose, and though the original gift was for charity the gift over to be valid had, therefore, to take effect within the perpetuity rule: *Re Bowen,* [1893] 2 Ch. 491; *Re Peel's Release,* [1921] 2 Ch. 218; *Re Talbot,* [1933] 1 Ch. 395. The learned Judge held that although the war would probably not continue for more than twenty-one years there was no *certainty* that this was not the case and that, therefore, the gift was void for perpetuity. This is an illustration of the necessity for making a definite limitation in point of time, no matter how unlikely it is that a contingency can happen beyond the rule of remoteness. Where a contingency is not dependent upon human lives it should always be expressed that the interest shall or shall not vest at the expiration of twenty-one years at the latest.

It is to be observed that this gift failed, notwithstanding that it was a gift over in favour of residue, because it was expressed in the form of a gift over. Had the interest to the charity been expressed as a terminable interest—that is, until the services were not held in the German language—the fact that the beneficiary was the residuary estate would have enabled the defeasance to be operative: *Re Randell,* 38 Ch. D. 213; *Re Stanford,* [1924] 1 Ch. 73.

In *Re Leverhulme,* [1943] 2 A. E. R. 274, the testator had directed a considerable property to be held upon certain trusts until the date for distribution. The date for distribution was fixed by a period of twenty-one years (less two days) from the last survivor of (1) his executors and trustees; (2) his descendants living at his death; and (3) the descendants living at his death of Queen Victoria. The question before Morton, J., was whether group (3) made the period so uncertain as to be too remote. In commenting on this limitation Morton, J., said (at p. 277): "It is manifest that, if the trusts in the will which I have just read are valid, the dead hand of the late Viscount Leverhulme will continue to govern the distribution of the income of this valuable stock and postpone the distribution of the capital for a period which may be as long as 100 years from the date of his death." The learned Judge then examined the evidence before him concerning the descendants of Queen Victoria, in which it appeared that such descendants might result from various types of marriages, including morganatic marriages and marriages not sanctioned by the head of the family, records of which are not kept with the same care as those of normal marriages. Nevertheless, Morton, J., decided to follow *Re Villar,* [1929] 1 Ch. 243, in which a similar provision relating to the descendants of Queen Victoria had been held to be valid on the ground that the cases were indistinguishable. With regard to the difficulty that may subsequently arise, particularly in view of the "present emergency", of proving when the last survivor dies, Morton, J., pointed out that the testator had died in 1925 and the limitations must be regarded as valid or invalid from that date.

Despite upholding the will the learned Judge added a caution: "I hope that no draftsman will think that because of my decision he will necessarily be following a sound course if he adopts the well-known formula referring to the descendants living at the death of the testator of Her late Majesty Queen Victoria. When that formula was first adopted, there was, no doubt, little difficulty in ascertaining who those persons were and it was not, I think, apprehended that there would be any difficulty in ascertaining when the last of them died. As a result of my decision the clause can still be validly employed in the case of a testator dying in 1925; but I do not at all encourage anyone to use the formula in the case of a testator who dies in the year 1943 or at any later date."

It would seem that this warning must be taken very seriously. The

political and social upheaval that has occurred in Europe during the last quarter of a century has rendered it peculiarly difficult to trace continental royal families. A limitation so framed is not really void for perpetuity but for uncertainty: *Re Moore,* [1901] 1 Ch. 936. In *Key & Elphinstone* (14th ed.) Vol. I, pp. 605, 906, and Vol. II, p. 944, either the issue of His late Majesty King Edward VII or His late Majesty King George V are the limitations employed. It is possible that the addition of some such words as "such issue now living [*or* living at my death] as can be shown to the satisfaction of the Court as being alive" would add certainty and render more readily possible the use of other stocks of descent, such as those mentioned in the will of the late Viscount Leverhulme.

(1 K. & E., 605, 906; 2, 862, 944, 1045, 1046, 1055, 1056.)

Settlement—name and arms clause—"neglect" to comply.—In a somewhat peculiar case, "neglect" to take the arms of the settlor did not operate to constitute a forfeiture. The "name and arms clause" was in an unusual form and did not include the words "refuse or" before "neglect". The beneficiary was, and had for many years been, resident in Tasmania and did not learn of the clause for more than twelve months (the time limit) after his interest had fallen into possession. Within three days of learning of his interest he executed a disentailing assurance. Simonds, J., held that "neglect" only covered the case "where the person, acting consciously, omits to do that which he ought to do as a condition". The learned Judge also approved a passage in *Halsbury's Laws of England* (Hailsham ed.) Vol. 29, at p. 792, where it is said: "Neglect, when used alone, *prima facie* covers only omissions that are negligent, but when used in certain contexts it may mean no more than 'fail'." In the whole of the passage incorporated in the judgment there also appears the statement that: "If a condition is expressed to take effect if the donee shall 'omit' or 'fail' to take the name and arms this will cover every case of non-compliance."

The "name and arms clause" is not as popular as it was, but should practitioners have occasion to deal with it some care is necessary to consider precisely the object of the settlor and frame the clause for non-compliance accordingly.

(2 K. & E., p. 735 n. (*i*).)

Estate contract—a contract to dispose according to direction.—Turley v. *Mackay,* [1943] 2 A. E. R. 1, is of importance as showing that an estate contract for the purposes of the Land Charges Act, 1925, s. 10 (1), is not confined to agreements between two parties to convey a legal estate from the one party to the other. The facts were, no doubt, unusual. The agreement in question required the principal only to dispose of any land acquired by him "under the supervision and direction of the agents", but it also contained provisions concerning the right to profits and liability to losses incurred in any such transaction. Uthwatt, J., held that such a contract could be registered as an estate contract and so its terms affected a purchaser with notice. He said (at p. 2): "In my opinion, the point of the Land Charges Act, 1925, s. 10, so far as it gives a right to register a land charge, is to secure that obligations affecting land may be registered by persons who have a commercial interest in seeing that such obligations shall be carried out. In this case, undoubtedly, the agents have such a commercial interest. Upon the construction of the section, I cannot see that it is limited to cases where the obligation is to convey or create a legal estate in favour of the person with whom the obligation is made."

It should, however, be pointed out that an estate contract can only be a contract affecting a conveyance or the creation of a legal estate. It cannot affect only the creation or protection of an equitable interest not operating to determine the right to the conveyance or creation of a legal estate.

(1 K. & E., p. 344, n. (*q*).)

Emergency legislation—war damage contribution—liability of mortgagee.—Re Ridley, [1943] 1 A. E. R. 603, is a short point, but of some practical importance on liability for war damage contribution. Where a mortgagee is in possession of the property or has appointed a receiver at the relevant date, the instalment of war damage contribution is payable by him. In *Re Ridley* (*supra*) the mortgagee had appointed a receiver as long ago as 1916, but the receiver died on May 10, 1941, and a new receiver was not appointed till March 25, 1942. Uthwatt, J., held that there was no receiver appointed on the relevant date (January 1, 1942) and consequently the mortgagee was not liable to pay the war damage contribution. This was a very strong case, because the property had been requisitioned and the requisitioning authority had paid to the new receiver the whole of the sum payable as rent in respect of compensation.

Ideal Life Assurance Co. v. *Hirschfield,* [1943] 1 A. E. R. 563, raises a different point. Under the War Damage Act, 1941, s. 25 (now W. D. Act, 1943, s. 51), a mortgagor claimed to deduct war damage contributions in respect of interest payable on a number of mortgages of dwelling-houses, each of less than £150 contributory value. The mortgagees claimed that all the mortgages, in total amounting to £6,000, had been made at one time and were made by separate mortgages and that they together constituted one transaction for the purposes of the Act. The Act applied to enable contributions to be deducted, not only where the contributory value was below a certain scale but also only where the money had been borrowed either (i) to acquire the property, or (ii) to execute works. In this case it appears that "the granting or 'creation' of the mortgages and the acquisition of the interest in all the houses were in truth part of one transaction and the period of time covered by that transaction was an 'occasion'": *per* du Parcq, L.J. (at p. 565). Consequently, it was held that there was no right to deduct the contributions.

Clearly, what in any given circumstances will be sufficient to constitute one transaction for the purposes of the Act, so that several properties mortgaged may be aggregated for the purpose of ascertaining contributory value, is a question of fact. It appears to involve something of the same reasoning behind the certificate of value for the purposes of the Finance Act, but of course it would be most unsafe to rely on the cases under one section as determining the question under the other.

Emergency legislation—Possession of Mortgaged Land (*Emergency Provisions*) *Act,* 1939—"*mortgage money*", *meaning of.*—In *Russell* v. *Weinreb,* [1943] 1 Ch. 128, Uthwatt, J., held that "mortgage money", in the proviso in section 1 (2) of the Possession of Mortgaged Land, etc., Act, 1939, requiring a written demand for the mortgage money to remain unmet for three months, applies only to principal money and not to interest. It is a question for construction on each statute and, therefore, the point only applies to this statutory provision.

This statute has been replaced by the Courts (Emergency Powers) Act, 1943, s. 4, but the requirement of a written demand for the "mortgage

money" is retained in sub-section (6) of this section. It would appear that the same construction would be put upon "mortgage money" under the new Act as in this case.

Emergency legislation—appointment of new receiver by mortgagee—necessity for leave.—In *Re White's Mortgage,* [1943] 1 A. E. R. 399, Uthwatt, J., held that where a mortgagee desired to appoint a new receiver on the death of the existing receiver it was not normally necessary to obtain leave, since this was not exercising a remedy. In the instant case, however, the first receiver had died about a year before the date of the proposed further appointment and in these circumstances the learned Judge considered it necessary to obtain leave. The matter then really constituted a new transaction and a new receivership and hence fell within the provisions of the Act.

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2. *WILL CASES.*

Executors—right to retain for indemnity against leaseholds.—In *Re Bennett,* [1943] 1 A. E. R. 467, the personal representatives entered into possession of various leasehold properties. The residuary estate was not sufficient to meet all the pecuniary legacies, but the leaseholds were largely specifically bequeathed and assents were made from time to time, until only one property remained. The personal representatives took out a summons to inquire whether they could retain funds to meet contingent liabilities. In *Re Owers,* [1941] Ch. 389 (*ante,* Vol. 6, p. 57), Simonds, J., had held that where leaseholds are retained in possession by executors they are entitled to retain an indemnity fund. His view was based on the fact that the Trustee Act, 1925, s. 26, does not cover the case where the executor has entered into possession and thereby incurred, in addition to his liability as executor, the personal liability of an assignee of the term. Nevertheless, Uthwatt, J., in the instant case, held that the executors were not entitled to any indemnity out of the estate in respect of the property to which they assented passing under the bequests, but only to an indemnity for the property, thus far following *Re Owers* (*supra*). As reported, Uthwatt, J., gave no reasons for his decision, other than that he was following *Re Owers* (*supra*), but presumably he held that, notwithstanding that the personal representatives have entered into possession, they will cease to be liable if they subsequently assent under the Trustee Act, 1925, s. 26. This distinction affords some difficulty if it is the basis of the reasoning, because section 26 only applies to liability of the executors "as such", and the basis does not exist in the case where the personal representatives have entered into possession and so constituted a privity of estate.

Administration—incidence of estate duty against the residuary estate—pecuniary legacies.—*Re Anstead,* [1943] 1 Ch. 161, is a case of some importance elaborating the principle that real estate still normally bears its own estate duty, which remains not a testamentary expense: *Re Owers,* [1941] Ch. 17 (*ante,* Vol. 5, p. 228). In the instant case the testator, having directed an appropriation of certain funds for his wife, gave a number of pecuniary legacies and subject thereto devised and bequeathed the whole of his real and personal estate by way of residuary gift. After setting aside the sums payable to the wife, the total personal estate was insufficient to meet the legacies and estate duty. It was argued that the burden of discharging estate duty on the personal estate could not

be thrown on the residuary realty to increase the amount payable in respect of the pecuniary legacies. Uthwatt, J., held that, notwithstanding the provisions that nothing in the Administration of Estates Act, 1925, should alter the incidence of any death duties, the application of assets, under Sched. I, Part II, para. 2, did in fact have the effect of throwing the liability for estate duty on the residuary realty.

It had already been held that the pecuniary legacies are primarily payable out of personalty: *Re Thompson,* [1936] Ch. 676, but Part II, paragraph (2), provides that for payment of "funeral, testamentary, and administration expenses, debts and liabilities" the fund liable is "property of the deceased not specifically devised or bequeathed but included . . . in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies". As the residuary fund must first find a fund to pay pecuniary legacies, therefore, the realty as well as the personalty must meet estate duty before the fund for pecuniary legacies (see paragraph (5)) abates.

This may be the obvious solution in a case such as the present, but it is not always very certain what is intended by a specific devise of realty. This is emphasised by paragraph (2), which says "included (either by a specific or general description) in a residuary gift". It is not uncommon still to provide a special destination for all realty, and the form taken by a gift of this sort would usually be in the nature of a residuary gift of realty. Bearing in mind the effects of the increased incidence of taxation, where there is such an intention there is not usually an intention that pecuniary legacies, at any rate for substantial amounts, should be payable out of the realty (unless they are charged on it). All the rules for the application of assets in solvent estates are subject to a contrary intention on the part of the testator. Steps should be taken in such cases to make sure what is the testator's intention and then to express it clearly, so that it shall not be left to the implication of the law, possibly involving an application to the Court.

Probate—soldier's will.—The decisions on probate of soldiers' wills illustrate a rather different state of war in this country from what has been known for some time. In *In b. Rippon,* [1943] 1 A. E. R. 676, Pilcher, J., granted probate of a nuncupative will made by a major on the active service list of the Territorial Army, who was called up for service on August 25, 1939, and who thereupon sat down and drew up the document so admitted to probate. The major was reported missing at Dunkirk and a certificate had since been issued that he had been killed in action.

As reported, Pilcher, J., considered a number of authorities on the Wills Act, 1837, s. 11, decided in the South African War and the last war. In his view, it is not necessary that a state of war should exist for a soldier to be "*in expeditione*" within the ambit of the judgment in *Drummond* v. *Parish,* 3 Curt. 522. The War Office had called on the services of the major (under the powers conferred by the Reserve and Auxiliary Forces Act, 1939, s. 1) "being satisfied that the service of officers and men of the Territorial Army . . . is urgently required for ensuring the preparedness for the defence of the realm against external danger". The words "external danger" connoted in the mind of the learned Judge "invasion" or "aerial bombardment". Consequently, following the earlier cases of *In b. Hiscock,* [1901] P. 78, of a volunteer who was under orders for South Africa and mobilisation for such service in *Gattward* v. *Knee,* [1902] P. 99, and the case of an officer mortally wounded after operations had ceased in Waziristan (*Re Limond,* [1915] 2 Ch. 240), the learned Judge was able to hold that notwithstanding that no state of war existed the will could be granted probate as a privileged will.

Peculiarly enough, two cases decided in this war, *In b. Gibbon,* [1941] P. 118 n., and *In b. Spark,* [1941] P. 115, do not appear to have been cited though they would seem to be in point. In *In b. Spark* Hodson, J., held that a soldier in camp in this war, though not under orders for foreign service, is a mark for enemy action and consequently he may be regarded as "in actual military service". In *In b. Gibbon,* Henn Collins, J., held that a Regular Army dental officer who lived in his own home near to the military camp where he worked and who was killed in an air-raid was not "in actual military service". The distinction between this last case and the two other cases certainly seems very slight. In *In b. Rippon* (*supra*) the major was only warned to go to a camp where, *if war came,* he might be subject to attack from aerial bombardment or invasion. In *In b. Gibbon* (*supra*) the officer might be subjected to such attack during his working hours and, judging from experience and the actuality of what did occur, outside working hours. In fact, the whole question during this war, owing to its totalitarian character, has become unreal. It is suspected that the essential character of difficulty in obtaining the necessary legal advice will tend to make all embodied soldiers to be regarded as "in actual military service" for the present emergency.

Probate—exclusion of offensive matter.—In b. Hall, [1943] 2 A. E. R. 159, may be noted primarily as a guide to practitioners in advising clients who wish to express views which lead to their testamentary dispositions. The case is reported on a motion to exclude from probate certain words on the ground that they were scandalous and defamatory. The words sought to be struck out of the probate are not given in the report, but Bucknill, J., gave leave only for the omission of the words "for the family honour", and even then only with considerable hesitation. He said (at p. 160): "It seems to me that, *prima facie,* the probate ought to issue in the words of the will itself. I think that a testator not only has the right to dispose of his property, but he has the right also to give reasons why he has disposed of it in a certain way. On the other hand, he is not entitled to use his will as a means of libelling and unjustly injuring somebody against whom he has a spite; or, even if he has no spite, he has no right, I think, to libel anyone in his will by using words which have no direct bearing on the devolution of his property."

Gift of leasehold house together with furniture—one legacy—one part not to be disclaimed without the other.—Re Joel, [1943] 2 A. E. R. 263, may settle a somewhat disputed point. The testator devised "my house at 74 Brook Street together with the contents". The question was whether the legatee (the property was leasehold) was entitled to disclaim the premises and take the contents. The Court of Appeal held that such a bequest was one whole and could only be accepted or disclaimed together. In so holding the Court disapproved of the view of Joyce, J., in *Re Lysons* (1912), 107 L. T. 146, that he was compelled to hold otherwise in a similar case in deference to opinions expressed in *Re Hotchkys,* 32 Ch. D. 614, upon the interpretation of *Syer* v. *Gladstone,* 30 Ch. D. 614.

The decision should be noted because the form of bequest is not unusual. There is normally no reason for wishing to disclaim one bequest without the other, but in the case of leasehold premises with short terms and onerous covenants there may be obvious disadvantages.

(2 K. & E., p. 837, f. 3.)

Inheritance (Family Provision) Act, 1938—right to pension on husband's death.—In *Re Catmull,* [1943] 1 Ch. 262, Uthwatt, J., had to consider a question of principle, independent of the discretion to grant relief, of the application of the Inheritance (Family Provision) Act. In this case the estate was about £600 and the testator had left a widow and children. The testator had, in fact, given practically nothing to the widow and everything to the children. The learned Judge held that on the construction of section 1 (3) (4) the amount available within the discretion of the Court was two-thirds of the total sum, that if any part of the estate had been given to dependants that part must form part of the available capital and that where capital could be awarded in lieu of income the capital could only represent the capitalised value of a life interest. So, in this case the income of the total fund was £19 10s. per annum, two-thirds of the income would be £13 and all that the widow could be awarded as capital would be £13 per annum, capitalised according to her age. The essential point of this judgment is that the power to order payment out of capital does not affect the corpus so as to diminish it beyond a life interest to the dependant in whose favour the order is made. It is also important to note that in a case such as the present, dependants in fact take the whole interest but their share is diminished only in respect of two-thirds, or, if there is no widow, one-half.

In all these cases the actual exercise of discretion, though a judicial discretion, must vary from case to case. Nevertheless, it is of interest to note that the learned Judge took into account that the widow was entitled to a widow's pension arising from the testator's compulsory contributions, and in view of this fact and the opinion that there was no reason why the widow should not support herself without the aid of the testator's estate the learned Judge refused to make any award.

Condition violating the sanctity of marriage—invalidity.—In *Re Caborne,* [1943] 1 Ch. 224, a somewhat peculiar provision raised once again the propriety of conditions operating against the sanctity of marriage. The will was construed to constitute a gift over of an absolute gift of residue to the testatrix's son in the event of such son dying during the lifetime of his wife while he was still married to her. This was the event which happened though there was other provision should the marriage terminate in the parties' lifetime. Simonds, J., held that the gift over was invalid as being designed or tending to encourage an invasion of the sanctity of marriage.

In the course of his judgment Simonds, J., expressed the view that even where the parties are separated, which was the case here prior to the death of the testatrix, no provision can be made either by the spouses or a third party for a future divorce. The learned Judge distinguished the case of *Re Thompson,* [1939] 1 A. E. R. 681, where the testator's daughter was provided with a larger income if she were the widow of or divorced from her then husband, and the gift was upheld by Bennett, J., on the ground that that case must rest upon its special facts.

Misdescription.—On a subsidiary point, *Re Tharp,* [1942] 2 A. E. R. 358 (noted *ante,* Vol. 6, p. 104) has been reversed in the Court of Appeal: [1943] 1 A. E. R. 257. The testatrix gave a legacy to "the Tangier Society for the Prevention of Cruelty to Animals care of the Dispensary for Sick Animals". Bennett, J., had held that there was no such society as that described and that the gift failed. On the evidence before them the Court of Appeal held that the gift was to the Tangier branch of the

People's Dispensary for Sick Animals of the Poor Incorporated, that there was such a society and that the gift was good. The testatrix had been in the habit of sending money to an official of the People's Dispensary, to be used for the purpose of their Tangier branch, and the Court held that there was sufficient evidence to show that the gift was intended for the People's Dispensary, though it was a misdescription, and that the reference to the Tangier Society was only descriptive of the purposes for which the money was to be employed. The case is of interest for the analysis of extrinsic evidence applicable to determining the validity of a gift where there has been misdescription.

Another example of the problem of misdescription is to be found in *Re Mulder,* [1943] 2 A. E. R. 150. Here the testator, after reciting that he had carried on a business under a certain style, bequeathed " the goodwill of my said business to his trustees and directed that they should have certain powers of carrying it on. He then directed that his stepson should have an option to purchase and in default of his exercising it the trustees were to sell the business and to divide the proceeds as directed. In fact, the testator had been carrying on the business in partnership with his stepson in equal shares and the testator seems to have made his will under the mistaken belief that his stepson was only a salaried manager. There were other provisions which further exemplified this mistaken belief. The Court of Appeal (Greene, M.R., and Goddard, L.J.; Luxmoore, L.J., dissenting) held that this was such a misdescription as to render the gift to the trustees inoperative. Greene, M.R., said (at p. 153): " These considerations, in my opinion, make it quite impossible to treat the language used by the testator as applicable to the subject-matter which he in fact possessed. . . . The result is that, in my opinion, the expression ' the business ' must throughout be interpreted as meaning the whole business and nothing else, and both the original bequest of the business to the trustees and the beneficial dispositions are inoperative."

The distinction that the learned Master of the Rolls drew was between the gift of an interest in a thing, such as " my estate Whiteacre " when the testator only owned a share in Whiteacre, where there is merely a matter of *quantum,* and the attempt by will to deal with something that the testator did not own, namely, the whole business. The distinction appears to be a fine one and obviously depends very much upon the facts of each case, but it is likely that the distinction may be the subject of further elucidation in subsequent cases.

Order of payment of debts—agreement by the debtor—invalidity.—Re Rothermere, [1943] 1 A. E. R. 307, is of importance on one point, namely, that the only way in which a debtor can vary the order of payment of debts in the course of administration on his death is by creating an effective charge. Here the debtor had purported in the event of his death to make a sum " to become immediately due " and " constitute a first charge " on his estate. As a matter of construction it was held that the document was not intended as a charge on the whole assets of the debtor preventing their realisation by the personal representatives. As it did not create a charge, Uthwatt, J., held that it made the creditor a simple creditor ranking *pari passu* with other simple creditors, since otherwise it would enable a debtor to vary the order of payment provided by law. This principle, of course, only applies to insolvent estates. The order of priority for debts is settled directly by law: A. E. A., s. 34 (1). The order of application of assets, where the estate is solvent, is variable by will: A. E. A., s. 34 (3).

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3. *LANDLORD AND TENANT CASES.*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Rent Restrictions Acts—what constitutes a furnished letting.—One of the most important of modern decisions on the Rent Restrictions Acts, though not widely reported, is *Brown* v. *Robins* (1943), 168 L. T. 340 (C.A.), which raises the question what is a furnished letting within the meaning of the Acts.

It will be remembered that, save as regards certain provisions restricting their rent (which will be mentioned below) furnished lettings are not subject to control under the Rent Restrictions Acts. This has, not unnaturally, increased the attractiveness of this form of letting to owners of houses, some of whom have been tempted to exercise ingenuity in giving to their tenancy agreements the shape and form of fully furnished lettings, with a minimum of expenditure upon the actual provision of furniture. In these days it often happens that a house-seeker, with furniture of his own, is so anxious to secure a house that he is willing to enter into an agreement for a fully furnished letting, with an imposing schedule of furniture and furnishings, at a rental appropriate to the fully furnished letting, while he actually desires to put his own furniture into the house and requires few if any of the articles listed. So he signs an agreement to take the house with all the furniture and arranges with the landlord to have only those articles which he actually requires, or possibly none at all. It is known that this device has often been resorted to as a means of preventing the tenant acquiring a statutory right to retain possession under the Acts.

Brown v. *Robins* has robbed this device of its efficacy. In order to appreciate the decision it is necessary to turn to the sections which define what is a furnished letting within the Acts. By section 3 (2) (b) of the Act of 1939 (there is a like provision in section 12 (2) of the Act of 1920) the Acts do not, save as regards the provision as to rent already mentioned, apply to any dwelling-house *bona fide* let at a rent which includes payments in respect of use of furniture. By section 10 (1) of the Act of 1923, which qualifies section 12 (2) of the 1920 Act and section 3 (2) (b) of the 1939 Act, a dwelling-house is not deemed to be *bona fide* let at a rent which includes payments in respect of the use of furniture unless the amount of rent which is fairly attributable to the use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

In *Brown* v. *Robins* there was a written tenancy agreement for a fully furnished letting (with a comprehensive schedule attached) at a rent of £2 per week. But the tenant had his own furniture, and by arrangement with the landlord the only furniture of the landlord's which was put into the house was that set out in a much shorter list and worth, according to the evidence, only 5s. per week. However, in this case the parties recorded their arrangement in letters which a majority of the Court of Appeal construed as a new contract varying the tenancy agreement by substituting the short list of furniture for the long list in the original schedule. From this it necessarily followed that the only furniture of which the tenant had the use, and for the use of which he was paying part of the rent, was that set out in the short list, because since the new contract was made he had ceased to have any right to ask for the other articles. Accordingly the payments which the Court had to consider—and decide whether they formed a substantial portion of the whole rent—were those fairly attributable to the use of the furniture set out in the substituted short list. Obviously the comparatively small sum (in this case 5s. per week) fairly attributable to the items in the short list, is less likely to be regarded by the Court as

forming a substantial portion of the whole rent, than would be the weekly sum attributable to the original schedule.

However, the importance of the case as an authority arises from the second ground upon which Scott and du Parcq, L.JJ., based their decision, and upon which Croom-Johnson, J., based his judgment entirely (he not construing the letters referred to above as an effective new contract varying the agreement). This was, that as regards all those articles set out in the original schedule but not in the short list, they never having actually been put into the house for the tenant, the payments being made by the tenant were not in respect of *the use of furniture* (in the words of the Act) but at the most were in respect of a right to call for the furniture if he wanted it. Ignoring the letters which here constituted a variation of the original agreement, and even granting that the tenant retained the right to call for the residue of the furniture if and when he wanted it (the normal position which arises when arrangements of this kind are entered into) nevertheless that right in respect of the residue of the furniture, and to which a portion of his rent was attributable, was not the " use of furniture " within the provisions of the Acts defining furnished lettings. Scott, L.J., emphasised the point that for the tenant to have the *use* of furniture it had to be put *in the house*. du Parcq, L.J., stated the principle most clearly when he said: " If parties agree that some of the furniture shall not be delivered for a time and it is not delivered for a time . . . then it is quite impossible to say that the rent being paid during that period is being paid for the use of the furniture. There is a very clear distinction between having the use of furniture and having a right to call for its delivery so that you may use it ".

Croom-Johnson, J., in giving judgment to the same effect, added the important reservation that he was not dealing with the case where the tenant, having received the house from the landlord with the furniture actually in the house, is himself responsible for its removal and storage elsewhere. In such a case the landlord has *bona fide* observed his part of the bargain and genuinely given the tenant the use of the furniture in the house: it is entirely the tenant's responsibility that he then declines to use it and stores it elsewhere, and it is probable that in such a case the Court of Appeal would regard the house as *bona fide* let with the " use " of that furniture, and that portion of the rent which was in respect of the furniture as being attributable to the " use of furniture ".

A minor point decided by the Court of Appeal in this case is that the question whether the amount of rent which is fairly attributable to the use of furniture, having been given a monetary value by the evidence, forms a substantial portion of the whole rent, is always a question of fact for the trial Judge: the Court of Appeal would not, for instance, lay down as a matter of law that 5s. (or for that matter any smaller sum) is not a substantial portion of £2.

A further question arises out of this decision of the Court of Appeal and invites comment. Assuming that it is held, in a particular case, that the amount of rent which is fairly attributable to the use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent, then the Acts do not apply to that letting, save that as the dwelling-house is let at a rent which includes payment in respect of the use of furniture, section 9 of the Act of 1920 applies and limits the rent to a sum based on the " normal profit ", which is the profit which might reasonably have been expected from a similar letting in the year ending August 3, 1914, or September 1, 1939, in the case of houses brought within the Acts by the Act of 1939. It is fairly clear that the words " use of furniture " in this section are to be given the same construction as in the sections before the Court of Appeal in *Brown* v. *Robins*, so that the Court

will have to consider what payments are in respect of the " use " of furniture in that sense. The point seems to remain open to argument, however, whether the " normal profit " which governs the rent is to be on the basis of the furniture which the tenant actually has the " use " of, and presumably subject to adjustment if the tenant calls for the use of further furniture which the agreement entitles him to have, or whether the " normal profit " is to be assessed once and for all upon the basis of the profit to be expected from a similar letting in 1914 or 1939 with the " use " of certain furniture and a right to call for further items if required. This is an interesting matter for speculation until settled by some further decision. It will not arise of course in *Brown* v. *Robins,* as the effect of the special contract there was to vary the original agreement, leaving the tenant no right to call for any of the residue of the furniture, but it is an important question liable to arise with the class of letting under consideration.

(Woodfall, 24th edition, pp. 349, 366.)

Assignee of lease—construction of express covenant to remain liable for rent during residue of term—question of novation.—The decision of Asquith, J., in *Lyons & Co., Ltd.* v. *Knowles* (noted at p. 105 in Volume 7 of *The Conveyancer*) has now been affirmed by the Court of Appeal: 59 T. L. R. 229.

Purchaser entering as tenant at will or weekly tenant pending completion of contract of sale—whether instalments of purchase money limited by Rent Restrictions Acts.—The case of *Dunthorne and Shore* v. *Wiggins,* [1943] 1 A. E. R. 577, calls for careful scrutiny, as it has been cited for the rather far-reaching proposition that every purchaser let into possession pending completion and meantime paying off instalments of the purchase price is entitled to the benefit of the Rent Restrictions Acts, the permissible amount of the instalments being, it is suggested, limited to the recoverable rent under the Acts.

In fact, the circumstances of *Dunthorne and Shore* v. *Wiggins* were rather peculiar and require special consideration. The defendants jointly entered into a contract of purchase, but they were of very poor means and, as Bennett, J., pointed out, there was never the slightest prospect of their completing the purchase. It was evident that their main concern was to obtain the occupation of the house, which the owners refused to let but agreed to sell on certain unusual terms. The purchase price was £445, paid by a building society advance of £345 and a promissory note for £100 signed by the purchasers. In consideration " thereof " (presumably, of the purchase price being accepted in that form, though it is not very clear) the purchaser agreed to pay 25s. on Monday in each week until the promissory note was redeemed. Out of this the vendors were to receive 5 per cent. per annum interest on the unredeemed balance of the promissory note, £2 7s. was to be paid monthly to the building society under the mortgage, and rates and insurances on the property were to be discharged. Any balance was to be credited in reduction of the promissory note. There was a provision for increasing the weekly payment to cover any increases in rates or other statutory payments. The purchase was to be completed on the date the promissory note was redeemed, and pending completion the purchaser was allowed to enter " as tenant at will provided he pays . . . 25s. per week from the date of possession on to the actual date of completion ". The purchaser had the right after twelve months' occupation to vacate and, there being no payments in arrear, the contract was then to be regarded as null and void and the promissory note cancelled. If the

weekly payments became more than fourteen days in arrear the purchaser came under an obligation to deliver up possession and his interest ceased; in such case the promissory note was to be cancelled on payment of the arrears.

The document embodying these terms was stamped both as an agreement for sale and as a lease.

The defendants pleaded that it was not a genuine sale agreement, but was a device adopted by the plaintiffs, the vendor-landlords, with the object of avoiding the Rent Restrictions Acts. Bennett, J., did not expressly hold that the agreement was a device to avoid the Acts, but he did express the view, on these facts, that the " purchasers " had no expectation of being able to buy the house, that the " vendor " did not imagine they ever really intended to purchase, and that none of the matters were discussed which would be discussed between persons who genuinely intended to buy. He held that the payment of 25s. per week was a weekly payment giving the right to exclusive possession of the premises in question and therefore was to be considered as rent. The contract was accordingly a contract of tenancy, at a rent to which the Rent Restrictions Acts applied.

This seems a very fair conclusion to be drawn from the facts before the learned Judge. The primary nature of the payment of 25s. per week was that it was a weekly payment which entitled the defendants to occupy the house as tenants. It was a rent in everything but name.

There is, however, a far different type of case, which became quite common when the war raised difficulties in the way of securing advances on mortgage, where the purchaser quite genuinely intends to purchase. There is a *bona fide* contract of sale, and then pending completion or the arrangement of a building society mortgage the purchaser is let into possession as a tenant at will, meantime paying specified instalments off the purchase price and accruing interest. Quite properly a clause may be added enabling the vendors to rescind and recover possession in the event of default on the part of the purchaser in the payment of these instalments. No doubt this form of contract, of which the writer has seen various examples during the war, is familiar to the reader. No rent is reserved, and no clauses are inserted identifying the instalment payments as rent. Those instalments retain their evident character as instalments of purchase money and interest: their operation as enabling the purchaser to retain possession is quite secondary and incidental.

It seems to be suggested by the learned author of the editorial note in the report cited above that all such contracts must now be regarded as giving rise to tenancies subject to the Rent Restrictions Acts, and that the instalments are therefore limited in amount to the recoverable rent under the Acts. This surely is quite mistaken. *Turner* v. *Watts* (1928), 97 L. J. K. B. 403, establishes that a *bona fide* contract of sale of the kind last described does not make the purchaser a protected tenant under the Acts. In *Dunthorne and Shore* v. *Wiggins*, Bennett, J., nowhere claims to differ from the decision in *Turner* v. *Watts* or question the soundness of its law. He was dealing with a very special case, and his judgment was addressed to the peculiar document in front of him. His finding that the 25s. per week reserved by that document was a rent must not be generalised into a proposition governing all contracts letting the purchaser into possession while instalments of purchase money are paid. In the view of the writer this is a quite erroneous conclusion to draw, *Dunthorne and Shore* v. *Wiggins* being a decision simply on the peculiar contract there before the Court. It is not a decision to generalise from, and evidently typifies the exception rather than the rule.

(Woodfall, 24th edition, p. 347.)

War damage—ground lease—substantial part capable of beneficial occupation—principles to be followed by Court in fixing the amount of rent.—Since the Landlord and Tenant (War Damage) (Amendment) Act, 1941, the provisions of the Landlord and Tenant (War Damage) Act, 1939, for service of notices of disclaimer and retention have been equally applicable to ground leases. Previously the only kind of notice which the lessee of a ground lease could serve was a notice of disclaimer, and then only with leave of the Court, having shown circumstances making it equitable to allow him to disclaim. There could be no notice of retention, and no reduction of rent. The ground landlord continued to receive the ground rent in full, or else he received the property back freed altogether from the lease. His interest was thus regarded not so much as a proprietary interest in the land, liable to be affected by the misfortunes happening to the land (in the words of Uthwatt, J.), as a monetary investment to be accorded special protection. Now this has all been altered by the Amendment Act bringing ground leases into the general scheme of the Acts and abolishing the special provisions which previously applied to them. Now either a notice of disclaimer or any of the other kinds of notice allowed under the Acts may be served in respect of property comprised in a ground lease.

If the lessee serves a notice of retention (whether a conditional notice or an ordinary unconditional notice) the provisions of section 10 come into operation, whereby no rent is payable from the date of service of the notice until the land is rendered fit, but the landlord can apply, on the ground that part of the land is capable of beneficial occupation, for a rent to be fixed (section 10 (1) (c)). The Court then has to decide the amount of rent, the times of payment and the period for which it is to be paid, and the only guidance provided by the Act is a maximum which the Court may not exceed in fixing the amount of the rent. This maximum is such proportion of—

(i) the annual value at the time of the application of so much of the land as is at the time capable of beneficial occupation; or

(ii) the full annual rent reserved by the lease;

whichever is the less, as the period in respect of which the rent is payable bears to a year.

Thus, the maximum rent which the Court may fix is a yearly rental equal to the annual value of the part which is capable of beneficial occupation, unless the full annual rent reserved by the lease is less than the annual value of that part (which is likely to happen in the case of a ground lease where a substantial part remains capable of beneficial occupation); within the limit of this maximum which is set, there is no guidance to the Court as to how the loss is to be apportioned between ground landlord and tenant.

In *Re Orbit Trust, Ltd.'s Lease* (1943), 59 T. L. R. 188, Uthwatt, J., has considered this question and laid down a principle for the apportionment of the loss between the ground landlord and tenant. He has decided that the Court will act on the general principle that war damage is to be regarded as a common loss and is to be apportioned accordingly. In the absence of special circumstances the Court will compare the annual value (at the date the war damage happened) of the land as unaffected by war damage, with the annual value of that land at the same date as affected by the war damage. The ground rent will be reduced proportionately. Furthermore, unless there are special circumstances, the rent so fixed by the Court should, in the opinion of the learned Judge, be fixed at the outset once and for all, to run for the whole period from service of the notice of retention until the land is rendered fit (or, in the case of a conditional notice, until the lease determines as a result of the notice taking effect as a notice of disclaimer pursuant to the determination of the War Damage Commission

to make a value payment). These principles will be followed in the case of both conditional and unconditional notices. Neither the incidence of the original covenant to repair, nor the premium paid on the grant of the lease, will be taken into account as a special circumstance in settling the amount of the rent.

Where the damaged part is very small, and all the property comprised in the lease is used and valued as a single unit, it was contemplated by Uthwatt, J., that the rule of *de minimis* might apply to the very small depreciation in annual value. Where, however, as in the case of one of the properties before him, the damaged part is in substance a distinct property capable of separate valuation and normally separately valued, then the rule of proportion will be applied though the consequential reduction in the amount of the ground rent may be very slight.

It was pointed out by the learned Judge that it would assist the Court on the question of costs if in this kind of dispute the landlord made at some stage a firm offer of the least rent he was willing to accept, and the tenant of the highest rent he was willing to pay. These offers need not, unless the parties so desire, be mentioned to the Court until the amount of rent has been fixed and the question of costs arises.

As the Court for the purposes of the Landlord and Tenant (War Damage) Acts is normally the county court, this decision of the Chancery Division on the fixing of the amount of rent under section 10 will prove a valuable guide in many cases.

(Woodfall, Supplement No. 3, p. 34.)

Landlord and Tenant (War Damage) Acts—notice of retention—whether reduced rent fixed by the Court is to operate from the date of the damage or from the date of service of the notice of retention.—The Landlord and Tenant (War Damage) Acts, 1939 and 1941, are producing a flow of questions as to the way their complicated provisions are to be worked out in practice, as witness the last case noted. In *Prudential Assurance Co., Ltd.* v. *Reville, Ltd.* (1943), 59 T. L. R. 325, several questions have been decided by the Court of Appeal with regard to the fixing of a reduced rent by the Court where a notice of retention has been served in relation to partially damaged premises.

Under section 10 (1) of the Act of 1939, one effect of the service of a notice of retention is that no rent is payable by the tenant in respect of the period beginning with the date when the notice was served and ending with the date on which the land is rendered fit, but the landlord can apply, on the ground that part of the land is capable of beneficial occupation, for an order that there shall be payable by the tenant such rent, at such times and in respect of such period as the Court may fix. The Court of Appeal has ruled that under this provision the Court may not order the reduced rent to be payable from any date earlier than the date of service of the notice of retention. This certainly seems to be the natural construction one would give to the section, because when it is read as a whole it is seen that the Act does not purport to interfere at all with the contractual rent for any period prior to the service of a notice of retention.

Under section 15 of the same Act, which is the section dealing with multiple leases, where a notice of disclaimer, notice of retention or notice to elect has been served, either party may apply to the Court within one month to determine the question whether the tenant should be allowed to exercise the right of retention, either as respects the lease as a whole or one or more of the tenements comprised therein, or at all. One of the courses which the Court can adopt on such an application is, if it is not satisfied

that it is equitable to allow the disclaimer or retention at all, to direct that the land shall not be deemed to be unfit and that the notice of disclaimer or retention, or notice to elect, shall cease to have effect (see section 15 (5)). There is, however, an important proviso to this, that if, having regard to the extent of the war damage, it considers it equitable to do so, the Court may order that the rent reserved by the lease shall, until the war damage is made good, be reduced to such extent as may be specified.

The Court of Appeal has decided, in the above case, that any order made by the Court under this proviso to section 15 (5), reducing the amount of the rent, may, like an order under section 10 (1), relate only to rent payable after the date of the service of the notice which is the occasion of the application.

An interesting point which arose in the case was that the landlords, having received a notice of retention from the tenants, joined an application under section 15 with an application under section 10 (1) (c), on the footing that part of the land was capable of beneficial occupation. At the hearing the applicants, being apprehensive whether a retrospective reduction of rent might not be ordered under section 15 (there had, for a number of reasons, been a long interval between the occurrence of the damage and the service of the notice of retention), and feeling more confident that section 10 (1) (c) could not be applied retrospectively, abandoned the application under section 15. The County Court Judge thereupon ruled that he could not further deal with the rights of the parties by reference to section 15, and that he had to consider the matter simply as an application under section 10. The Court of Appeal held that the County Court Judge was wrong on this, though it did not affect the result because of the construction which the Court proceeded to give to section 15. Once the application comes before the Judge it becomes his duty to make an order which is fair to both parties in the light of all relevant litigation; and this duty continues notwithstanding that the applicant may desire during the course of the hearing to withdraw the application which brought the matter before the Court.

The question was raised during argument whether a Judge, in ordering a reduction of rent from the date of the notice, could take into account in fixing the amount the fact that the tenant had for some months before the notice paid the full rent for premises the value of which was much diminished. The question did not call for decision in the present case, and was therefore reserved by the Court of Appeal, but the Court stated, while expressing no final opinion, that its inclination was against conditions before the service of the notice being taken into account.

(Woodfall, Supplement No. 3, pp. 34, 41.)

Building Lease—completion of buildings prevented by the war—lease not frustrated.—The decision of Asquith, J., in *Leighton's Investment Trust, Ltd.* v. *Cricklewood Property and Investment Trust, Ltd.* (1942), 59 T. L. R. 27, discussed in *The Conveyancer,* Vol. 7, p. 107, has now been approved by the Court of Appeal: 59 T. L. R. 318. The decision of the Court of Appeal reaffirms the well-established rule that the doctrine of frustration cannot be applied to a demise of real property.

(Woodfall, 24th edition, p. 342; Supplement No. 3, p. 8.)

Defence Regulation 62 (4) (A)—*Minister not under duty to act judicially as between tenant and his landlord.—Irving* v. *Patterson* (1943), 59 T. L. R. 247, illustrates the working of Regulation 62 (4) (A) of the Defence (General) Regulations, under which the consent in writing of the

Minister of Agriculture and Fisheries is required to validate a notice to quit an agricultural holding if it is subject to a contract of sale made since September 3, 1939, or has been sold in pursuance of a contract of sale made since that date. It has been held by Uthwatt, J., in the above case that the Regulation does not impose any duty upon the Minister to act judicially as between the tenant and his landlord, or indeed any duty at all to the tenant. The Minister's function under the Regulation is purely administrative. In this case the tenant complained that he was not invited to appear before the county war agricultural committee, to whom the Minister referred the landlord's application for consent for the purpose of inquiry, and on whose report the Minister acted. The tenant also complained that he had not received a copy of the Minister's consent, nor any intimation that it had been given or even applied for. Nevertheless he had no remedy, for the reason stated above.

Rent Restrictions Acts—requirement that the Court shall consider it reasonable to make the order, before giving judgment for recovery of possession—construction.—It is provided by section 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, that no order or judgment for the recovery of possession of a controlled dwelling-house shall be made or given unless the Court considers it reasonable to make such an order or give such a judgment, and either (a) the Court has power to do so under the First Schedule, or (b) the Court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.

In *Cumming* v. *Danson* (1942), 59 T. L. R. 70, the Court of Appeal considered what matters the Judge should take into account in deciding whether it is reasonable to make an order or give judgment for recovery of possession. The Court of Appeal there laid down that the County Court Judge must take into account in a broad, common-sense way all relevant circumstances as they exist at the date of the hearing, giving such weight as he thinks fit to the various factors in the situation. For instance, if the landlady who is desirous of recovering possession has a family of refugees living with her in a small cottage, and is desirous also of having relatives such as a sister and her husband to live with her, these are all factors which the Judge must consider and decide how much weight he will attach to them.

The Judge must not confuse the requirement of reasonableness under this provision, which is a broad requirement necessitating all the circumstances to be looked at, with the much more narrowly circumscribed requirement of reasonableness when an application is made under paragraph (h) of the First Schedule. Under paragraph (h) the Judge has to consider whether the dwelling-house is reasonably required *by the landlord* for occupation as a residence for himself, a son or daughter over eighteen, or his father or mother. Obviously considerations as to whether it is reasonably required for occupation by anyone else, however meritorious of the sympathy of the Court, are excluded when the question of reasonableness is being decided under that paragraph. But that is quite a different matter from the question whether it is reasonable to make an order under the provision of section 3 (1) of the Act of 1933 quoted above. Where, for instance, there is proof of suitable alternative accommodation, he must view broadly all the considerations affecting the question whether it is then reasonable to make the order.

The Master of the Rolls mentioned several considerations which will generally fall to be considered from the point of view of the tenant, in particular the hardship, if any, of compelling him to take the alternative

accommodation, and such questions as whether he has expended money on the house. The Judge must weigh up all the considerations on both sides, and not limit himself to one aspect of the matter only, such as the landlord's own personal needs.

A *dictum* of the Master of the Rolls in this case which will probably live and be oft quoted is his neat observation on the general purpose of the Acts: "The Rent Restrictions Acts are Acts for the protection of tenants and not for the penalising of landlords."

(Woodfall, 24th edition, p. 297.)

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4. *INCOME TAX CASES.*

By LEONARD STEIN, Barrister-at-Law.

[The decisions selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the subjects with which *The Conveyancer* is primarily concerned.]

Income tax—Schedule A—annual value—act of service of lift.—The decision of Macnaghten, J., in *Pearl Assurance Co., Ltd.* v. *C. I. R.*, [1942] W. N. 185 (see *The Conveyancer*, June, 1943, at p. 212) has been reversed by the Court of Appeal, [1943] W. N. 103. Suites in an office building were let to various tenants at rents including payment for certain services. Schedule A tax was chargeable on the landlord under Rule 8 (c) of No. VII of Schedule A. It was common ground that the gross annual value must be estimated by reference to the aggregate amount of the rents, and that in computing that amount a deduction must be made for the cost of the services. The matter in dispute was whether the deductions ought to include the cost of maintaining and repairing the lift. On this point Macnaghten, J., decided in favour of the landlord. The Court of Appeal took a different view, holding that the lift in its nature was an essential part of the hereditament and must in any case be deemed to be such by virtue of section 22 of the Finance Act, 1936, which, read together with section 24 of the Rating and Valuation Act, 1925, provides, in effect, that the classes of machinery and plant to be deemed to be part of the hereditament shall include "lifts and elevators mainly or usually used for passengers". It followed that the cost of maintaining and repairing the lift was not part of the cost of the landlord's services to the tenants, but an expense falling to be borne by the landlords in keeping the hereditament in a state for letting at the rents which it commanded.

Income tax—premises requisitioned under emergency powers—compensation—Finance Act, 1940, *s.* 15.—The short point in *Mellows* v. *Buxton Palace Hotel, Ltd.*, Tax Leaflet 1216, was whether compensation payable in respect of premises requisitioned under the emergency powers is rent for the purposes of the 1940 legislation relating to the taxation of excess rents. The effect of section 15 of the Finance Act, 1940, is, as is well known, that where the rent payable to an immediate lessor under a short lease exceeds the net Schedule A assessment, the lessor will be taxable on the excess under Case VI of Schedule D. An hotel owned by the Buxton Palace Hotel, Ltd. having been requisitioned, compensation was paid under section 2 of the Compensation (Defence) Act, 1939. It is there provided that for income tax purposes the compensation shall be deemed to be rent paid by the Crown as tenant occupier and received by the person to whom it is payable as landlord. Up to this point it would seem clear that for the purposes of section 15 of

the Finance Act, 1940, no distinction can be drawn between compensation payable under the Compensation (Defence) Act and rent in the ordinary sense of the term. It was, however, argued on behalf of the company that section 15 did not apply, since it speaks of " rent payable under a lease ", and in the Compensation (Defence) Act it is not expressly provided that compensation shall, for tax purposes, be deemed to be rent payable under a lease. This contention received short shrift at the hands of Macnaghten, J. Section 13 of the Finance Act, 1940, requires " lease " to be interpreted as including " any tenancy ". The Crown was to be deemed to pay the compensation as tenant occupier, and the notional existence of a tenant must of necessity carry with it the notional existence of a tenancy.

Income tax—revocable settlement—two settlors—Finance Act, 1938, *s.* 38 (2).—The effect of section 38 of the Finance Act, 1938, is that, in the case of settlements of certain types, income arising under the settlement is to be treated as the income of the settlor and not as the income of any other person. What, then, is the position where there is more than one settlor? If both A and B are settlors and the income is attributed to A, he will be entitled to reply that it is required to be treated as the income of B and not of any other person. If it is attributed to B, he will be entitled in like manner to return the ball. This was the question which arose in *Herbert* v. *C. I. R.*, Tax Leaflet 1220. Macnaghten, J., decided that it was insoluble; where there was more than one person who was, or must be treated as, a " settlor ", section 38 (2) of the 1938 Act could not be applied. What is true of section 38 (2) is, of course, equally true of the associated provisions of Part IV of the Finance Act, 1938. The same question can also arise under section 21 of the Finance Act, 1936, and under section 20 (so far as still in force) of the Finance Act, 1922. The Legislature has promptly grappled with the problem. Section 20 of this year's Finance Act declares, for the removal of doubts, that where there is more than one settlor or disponor, Part IV of the 1938 Act, section 21 of the 1936 Act and section 20 of the 1922 Act have effect in accordance with the provisions of the Sixth Schedule, which lays down rules designed to ensure the attribution to each settlor or disponor, where there is more than one, of an appropriate part of the income in question.

Income tax—tax-free annuity—Income Tax Act, 1918, *General Rules, Rule* 23.—Rule 23 of the General Rules of the Income Tax Act, 1918, provides, as is well known, that an agreement for the payment of an annual sum without deduction of tax shall be void, *i.e.*, void to the extent to which deduction of tax is renounced. It has long been well settled that the Rule has no application to testamentary gifts of tax-free annuities, since there is here no " agreement " but merely an act of bounty on the part of the testator. *Re Goodson*, [1943] 1 A. E. R. 201, was concerned with a settlement by which the settlor (who had already transferred the securities constituting the trust fund into the hands of the trustees) directed the payment of certain annuities, declared that " each of the said annuitants shall be entitled to enjoy her annuity free from income tax ", and directed the trustees " to pay, in addition to each annuity, the income tax which may be payable in respect thereof after allowing for any exception (*sic*) or abatement to which the annuitant may by law be entitled . . .". The matter in dispute was whether, by reason of Rule 23, the annuities were, notwithstanding the provisions of the settlement, payable under deduction of tax. Uthwatt, J., held that Rule 23 had no application, since there was here no " agreement " within the meaning of the Rule. There was nothing in the

nature of a bargain. The beneficiaries had no rights against the settlor and no contractual rights against the trustees. They had equitable rights which could be enforced, but not by an action in contract. The test being whether there is an "agreement", and the learned Judge being of opinion that here there was none, it followed that the application of Rule 23 was as effectively excluded as it is excluded in the case of wills.

Surtax—trust for accumulation—beneficiary entitled to transfer of trust fund—fund left in hands of trustees.—The judgment of Macnaghten, J., in favour of the taxpayer in *Hamilton-Russell's Executors* v. *C. I. R.*, (see *The Conveyancer*, March, 1943, at p. 168), has been reversed by the Court of Appeal—[1943] 1 A. E. R. 474. A settlor had directed that the income of the trust fund should be accumulated during his lifetime, and that, after his death, the fund, together with the accumulations of income, should be held in trust for such one of his children as, being tenant in tail male by purchase of certain estates, should first attain the age of twenty-one. A son, H. R., attained the age of twenty-one in 1928 and, being tenant in tail male by purchase of the estates in question, became the sole beneficiary under the settlement. Though the settlor was still living, and the trusts declared by him required the income of the fund to be accumulated during his lifetime, the effect of the well-known principle applied in *Wharton* v. *Masterman*, [1895] A. C. 186, was—as was not disputed—to entitle H. R. to put an end to the accumulation of income and to call for a transfer of the trust fund. H. R. did not, however, exercise these rights until January, 1939, when he instructed the trustees to transfer to him the investments representing the accumulations of income. He left the rest of the trust fund in the hands of the trustees pending his further instructions, but directed that the future income should be paid to him or his nominee. The Crown claimed surtax for 1938–39 on the whole amount of the income which had accrued since H. R.'s attainment of the age of twenty-one in 1928. Macnaghten, J., held that, since H. R., though entitled to put an end to the accumulations in 1928, had not, in fact, exercised that right, the income accumulated between 1928 and 1939 must be considered to have been accumulated under the trusts of the settlement and accordingly to have come to H. R. as capital. In the Court of Appeal the Crown conceded that surtax for 1938–39 was chargeable only on so much of the accumulations as represented the income of the trust fund from April 6, 1938, to January 18, 1939, when the accumulations was stopped by H. R. On the question of principle, however, the Crown succeeded. The Court of Appeal was unanimous in holding that from the moment when H. R. became the only person beneficially interested under the settlement the income of the trust fund was the income of H. R. and no one else, and that, since from that time the trust fund belonged solely to him for his own absolute use and benefit, it was immaterial that he had given no instructions to the trustees. *C. I. R.* v. *Dewar*, 19 T. C. 561, was distinguished on the ground that there the question was whether the income which it was sought to tax had ever come into existence, whereas here there was no doubt as to the existence of the income, and all that had to be done was to ascertain whose income it was. It was—it was held—clearly the income of the person who had become beneficially entitled to the trust fund from which it arose.

Income tax—settlement in favour of children—whether settlement was irrevocable—payments before date of Royal Assent—Finance Act, 1936, *s.* 21 (8), (10).—By sub-section (10) of section 21 of the Finance Act, 1936, the well-known provisions of that section with regard to settlements

for the benefit of children apply to "every settlement . . . except a settlement made or entered into before the twenty-second day of April, 1936, which immediately before that date was irrevocable". Sub-section (8) provides that "for the purposes of this section a settlement shall not be deemed to be irrevocable if . . .". Then follows a list of the tests to be applied. In other words, a settlement which is irrevocable in the ordinary sense of that expression is, "for the purposes of this section", to be deemed not to be irrevocable if it falls within any of certain specified categories. Is sub-section (8) to be applied in deciding whether a settlement made before April 22, 1936, was, within the meaning of sub-section (10), irrevocable immediately before that date? In *C. I. R.* v. *Delamere,* 22 T. C. 525, this question was answered by Lawrence, J., in the affirmative. The same question has now come before the Court of Appeal, and has received the same answer, in *Eastwood* v. *C. I. R.,* [1943] T. R. 59. It is true that the words in sub-section (8) are "shall be not deemed to be irrevocable"—not "shall not be deemed to be or to have been irrevocable". But, in the opinion of the Court of Appeal, a lack of grammatical neatness or exactitude cannot outweigh the plain meaning of the words "for the purposes of this section", so as to limit the application of sub-section (8) to provisions of section 21 other than those of sub-section (10). The words "this section" mean the whole of the section of which sub-section (10) forms part, and the word "irrevocable" in sub-section (10) must accordingly be construed by reference to sub-section (8).

In *Eastwood's Case,* above, the payments in respect of which it was sought to apply section 21 of the 1936 Act were payments made in the year of assessment 1936–37, but made before the date (July 16, 1936) on which the Act received the Royal Assent. It was contended, on behalf of the taxpayer, that such payments were outside the scope of section 21. Sub-section (1) begins: "Where . . . any income is paid to or for the benefit of a child of the settlor in any year of assessment". It was argued that the use of the present tense excludes the application of the section to payments made before the Act came into force. Rejecting this contention, the Court of Appeal held that the time unit with which the Finance Act invariably deals for the purposes of assessment is the financial year, and that there was nothing in the use of the present tense in the words "is paid" to prevent the section from applying, as it was clearly intended to apply, to the whole of the income paid during the year of assessment, irrespective of the date during that year in which the Act became law.

Surtax—"companies surtax"—definition of investment company—Finance Act, 1936, *s.* 20 (1).—The judgment in favour of the Crown of Macnaghten, J., in *F. P. H. Finance Trust, Ltd.* v. *C. I. R.* (see *The Conveyancer,* September, 1942, at p. 51) has been affirmed by the Court of Appeal—[1943] 1 A. E. R. 462.

Surtax—transfer of income to persons abroad—income consisting of profits of trading partnership—Finance Act, 1936, *s.* 18.—The judgment in favour of the Crown of the Court of Appeal, affirming the judgment of Lawrence, J., in *Latilla* v. *C. I. R.* (see *The Conveyancer,* March, 1942, at p. 222) has been affirmed by the House of Lords—[1943] W. N. 47.

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5. *DEATH DUTY CASES.*

By LEONARD STEIN, Barrister-at-Law.

Estate duty—gift inter vivos—bona fide *possession and enjoyment by donee to entire exclusion of deceased.*—The decision in *Commissioner for Stamp Duties for New South Wales* v. *Perpetual Trustee Co., Ltd.*, [1943] 1 A. E. R. 525, was concerned with a claim to death duty under the New South Wales Stamp Duties Act, 1920, but is applicable to the English legislation relating to estate duty where property is deemed to pass on a death by reason of a gift *inter vivos*. In language modelled on that of section 38 (2) (a) of the Customs and Inland Revenue Act, 1881, which (as amended by section 11 (1) of the Customs and Inland Revenue Act, 1889) is incorporated in the Finance Act, 1894, by section 2 (1) (a) of that Act, section 102 of the New South Wales Act provides that, for death duty purposes, the estate of a deceased person shall be deemed to include (*inter alia*) "any property comprised in any gift made by the deceased, before or after the passing of the Act, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thereafter retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever". In the case under notice the deceased had made a settlement of certain shares for the benefit of his infant son. The trustees were directed to hold the shares upon trust, during the minority of the son, to apply the whole or any part of the capital or income for his maintenance and education and, on his attaining the age of twenty-one, to hold the trust fund, including accumulations of income, in trust for him absolutely. Out of the income of the trust fund the trustees paid the premiums on an insurance policy on the life of the son. With this exception, the whole of the income was accumulated. The settlor died in 1921. The son attained the age of twenty-one in 1931, when the trust fund was transferred to him. On these facts it was held by the Judicial Committee, affirming the decision of the High Court of Australia, that the trust fund did not fall to be included in the property deemed to pass on the death of the deceased. It was pointed out that the "possession and enjoyment" to be considered are clearly the beneficial possession and enjoyment. When the shares were transferred to the trustees and the trust declared, exclusive beneficial possession and enjoyment of the property, to the full extent of the gift, immediately passed to the son. From the date of the gift the deceased did not, in fact, receive any benefit in any way derived from or referable to the gift. Had the son died, survived by his father, before attaining the age of twenty-one, there would have been a resulting trust in favour of the father. But the possession and enjoyment from which the donor must be shown to have been entirely excluded must be understood to mean possession and enjoyment of the property within the scope of the beneficial interest given to the donee. There was—it was held—nothing inconsistent with such exclusion in the possession and enjoyment by the donor of a beneficial interest not included in the gift. The Judicial Committee expressly approved the decision in *Re Cochrane*, [1906] 2 Ir. R. 200, and (contrary to the view expressed by Lord Sterndale, M.R., in *Att.-Gen.* v. *Sandwich*, [1922] 2 K. B. 500) held that *Re Cochrane*, above, was not inconsistent with *Att.-Gen.* v. *Worrall*, (1895), which merely decided that property forming the subject-matter of a gift *inter vivos* may be deemed to pass on the death where, in connection with the gift, the donor has received a benefit even though it be only a collateral benefit and not a benefit reserved out of the gift itself.